REPORTS OF CASES

DECIDED BETWEEN

AUGUST 30, 1991 and FEBRUARY 20, 1992

IN THE

Supreme Court of Nebraska

VOLUME CCXXXIX

STEVEN R. SCHROEDER

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By Steven R. Schroeder, Reporter of the Supreme Court

For the benefit of the State of Nebraska

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JUDICIAL DISTRICTS AND DISTRICT JUDGES

Number of District	Counties in District	Judges in District	City
First	Johnson, Nemaha, Pawnee, and Richardson	Robert T. Finn	Auburn
Second	Cass, Otoe, and Sarpy	Ronald E. Reagan	Papillion
		George A. Thompson	Papillion
		Randall L. Rehmeier	Nebraska City
Third	Lancaster	William D. Blue	Lincoln
		Donald E. Endacott	Lincoln
		Bernard J. McGinn	Lincoln
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		Earl J. Witthoff	Lincoln
		Paul D. Merritt, Jr.	Lincoln
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		James A. Buckley	Omaha
		John E. Clark	Omaha
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		Jerry M. Gitnick	Omaha
		Paul J. Hickman	Omaha
		Robert V. Burkhard	Omaha
		Stephen A. Davis	Omaha
		Lawrence Corrigan	Omaha
		Theodore L. Carlson	Omaha
		J. Patrick Mullen	Omaha
		Michael McGill	Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward, and York	Bryce Bartu	Seward
		Everett Inbody	Wahoo
Sixth	Burt, Dodge, Thurston, and Washington	Mark J. Fuhrman	Fremont
		Darvid D. Quist	Blair
Seventh	Fillmore, Nuckolls, Saline, and Thayer	Orville L. Coady	Hebron

JUDICIAL DISTRICTS AND DISTRICT JUDGES

Eighth	Cedar, Dakota, and Dixon	Robert E. Otte	Dakota City
Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Richard P. Garden Robert B. Ensz	Norfolk Wayne
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps, and Webster	Bernard Sprague Stephen Illingworth	Red Cloud Hastings
Eleventh	Hall and Howard	Joseph D. Martin William H. Riley	Grand Island Grand Island
Twelfth	Buffalo and Sherman	John P. Icenogle	Kearney
Thirteenth	Arthur, Dawson, Hooker, Keith, Lincoln, Logan, McPherson, and Thomas	John P. Murphy Donald E. Rowlands II	North Platte North Platte
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins, and Red Willow	John J. Battershell	McCook
Fifteenth	Boyd, Brown, Cherry, Holt, Keya Paha, and Rock		
Sixteenth	Box Butte, Dawes, Grant, Morrill, Sheridan, and Sioux	Robert R. Moran Paul D. Empson	Alliance Chadron
Seventeenth	Scotts Bluff	Alfred J. Kortum Robert O. Hippe	Gering Gering
Eighteenth	Gage and Jefferson	William B. Rist	Beatrice
Nineteenth	Banner, Cheyenne, Deuel, Garden, and Kimball	John D. Knapp	Kimball
Twentieth	Blaine, Custer, Garfield, Greeley, Loup, Valley, and Wheeler	Ronald D. Olberding	Burwell
Twenty-first	Boone, Colfax, Merrick, Nance, and Platte	John C. Whitehead Robert Steinke	Columbus Columbus

JUDICIAL DISTRICTS AND COUNTY JUDGES

Number of District	Counties in District	Judges in District	City
First	Johnson, Nemaha, Pawnee, and Richardson	Thomas J. Gist	Falls City
Second	Cass, Otoe, and Sarpy	Jeffrey L. Campbell	Papillion
		Albert C. Walsh	Papillion
		Randall L. Rehmeier	Nebraska City
Third	Lancaster	James L. Foster	Lincoln
		Gale Pokorny	Lincoln
		Donald R. Grant	Lincoln
		Jack B. Lindner	Lincoln
		Richard H. Williams	Lincoln
		Mary L. Doyle	Lincoln
Fourth	Douglas	Samuel V. Cooper	Omaha
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		John J. McGrath	Omaha
		Robert C. Vondrasek	Omaha
		Jane H. Prochaska	Omaha
		Stephen M. Swartz	Omaha
		Lyn V. Ferer	Omaha
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		Richard M. Jones	Omaha
		W. Mark Ashford	Omaha
		Edna R. Atkins	Omaha
Fifth	Butler, Hamilton, Polk, Saunders, Seward, and York	Curtis H. Evans	York
		Alan G. Gless	Seward
		Everett O. Inbody	Wahoo
Sixth	Burt, Dodge, and Washington	Daniel J. Beckwith	Fremont
		F. A. Gossett III	Blair
Seventh	Fillmore, Nuckolls, Saline, and Thayer	J. Patrick McArdle	Wilber
		Daniel Bryan, Jr.	Geneva
Eighth	Cedar, Dakota, Dixon, and Thurston	Rodney R. Smith	Dakota City
		Paul R. Robinson	Hartington

JUDICIAL DISTRICTS AND COUNTY JUDGES

Ninth	Antelope, Cuming, Knox, Madison, Pierce, Stanton, and Wayne	Stephen P. Finn Philip R. Riley Richard W. Krepela	Neligh Creighton Madison
Tenth	Adams, Clay, Franklin, Harlan, Kearney, Phelps, and Webster	Harry C. Haverly Jack Robert Ott	Hastings Hastings
Eleventh	Hall and Howard	Richard E. Weaver David A. Bush	Grand Island Grand Island
Twelfth	Buffalo and Sherman	Gerald R. Jorgensen	Kearney
Thirteenth	Arthur, Dawson, Hooker, Keith, Lincoln, Logan, McPherson, and Thomas	Lloyd G. Kaufman Kristine R. Cecava James M. O'Rourke	Lexington Ogallala North Platte
Fourteenth	Chase, Dundy, Frontier, Furnas, Gosper, Hayes, Hitchcock, Perkins, and Red Willow	Cloyd Clark B. Bert Leffler	McCook Benkelman
Fifteenth	Boyd, Brown, Cherry, Holt, Keya Paha, and Rock	August F. Schuman Alan L. Brodbeck	Ainsworth O'Neill
Sixteenth	Box Butte, Dawes, Grant, Sheridan, and Sioux	Glen A. Fiebig James T. Hansen	Alliance Chadron
Seventeenth	Garden, Morrill, and Scotts Bluff	James L. Macken G. Glenn Camerer	Gering Gering
Eighteenth	Gage and Jefferson	Steven Bruce Timm	Beatrice
Nineteenth	Banner, Cheyenne, Deuel, and Kimball	Thomas H. Dorwart C. G. Wallace	Sidney Kimball
Twentieth	Blaine, Custer, Garfield, Greeley, Loup, Valley, and Wheeler	Keith J. Kovanda Robert E. Wheeler	Burwell Broken Bow
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CUMULATIVE LIST OF CASES DISPOSED OF WITHOUT OPINION

No.44-128: **State v. Wyman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.86-401: **State Nat. Bank & Trust v. Victor.** Motion of appellee to dismiss appeal sustained; appeal dismissed.

No.86-1028: **Byrne v. Omaha Karate School.** Motion of appellee to dismiss filed October 30, 1991, sustained; appeal dismissed.

No.88-1024: **Kramer v. Whitmore.** By order of the court, case dismissed pursuant to stipulation of parties.

No.89-405: **Lowe v. Lowe.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.89-680: **Frimann v. Frimann.** Cause having not been shown, appeal dismissed on the court's own motion.

No.89-756: **Hager v. Hager.** Motion of appellant to dismiss appeal sustained; appellee's motion for attorney fees denied; appeal dismissed.

No.89-793: **Mandel v. State.** Remanded for further proceedings.

No.89-1143: **Haumont v. Broken Bow Township.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.89-1292: **Meyer v. Smith.** Stipulation allowed; appeal dismissed at cost of appellant.

No.89-1455: **Western Fertilizer & Cordage Co., Inc. v. Brittan.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No.90-040: **United Fire and Cas. Co. v. Vontz.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No.90-041: **United Fire and Cas. Co. v. Vontz.** Stipulation

allowed; appeal dismissed with prejudice; each party to pay own costs.

No.90-058: **Allendale, Inc. v. Drewes.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.90-121: **Kobza v. Kobza.** Stipulation allowed; appeal dismissed at cost of appellant.

No.90-190: **Fitzgerald v. Fitzgerald.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.90-287: **Dardon v. Dardon.** Motionof appellant to dismiss appeal sustained; appeal dismissed without prejudice; each party to pay own costs.

No.90-311: **Ames Bank v. Miller.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.90-438: **First Nat. Bank of Bellevue v. Kearns.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.90-505: **State v. Powell.** Appeal dismissed. See Rule 7A(2).

No.90-522: **Bishop v. Sughroue.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No.90-549: **State v. Wyman.** Cause not having been shown, appeal dismissed as premature.

No.90-567: **Farmers Ins. Exch. v. Hoagland.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No.90-1177: **State v. Miller.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.90-1192: **Wolfe v. Volkmer.** Amended motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.90-1213: **State ex rel. Kessler v. Sell.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No.90-1243: **Control Marketing Corp. v. Colliano.** No cause having been shown, appeal dismissed.

No.91-029: **State v. Rogers.** Affirmed. See Rule 7A(1).

No.91-065: **Muckey v. North Bros. Co.** Stipulation allowed; appeal dismissed.

No.91-067: **Wead v. Wead.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-069: **State v. Rodriquez.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule

7B(2).

No.91-091: **Thompson v. Prial.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-176: **Freezer Services, Inc. v. Waller.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No.91-183: **Weisgerber v. Weisgerber.** Appeal dismissed for failure to comply with Rule 5A(5).

No.91-198: **State v. Mercer.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-201: **Hanus v. Sodoro, Daly & Sodoro Law Firm.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-205: **Triffin v. Rowan.** By order of the court, appeal dismissed for failure to file briefs.

No.91-209: **State v. McClain.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-220: **Lockard v. Ray.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No.91-225: **State v. Scheppy.** Affirmed. See Rule 7A(1).

No.91-229: **State ex rel. Nebraska Equal Opp. Comm. v. City of Omaha.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-239: **State v. Navrkal.** Appeal dismissed for failure to file briefs.

No.91-240: **State v. Navrkal.** Appeal dismissed for failure to file briefs.

No.91-245: **Hoffman v. Miller Co., Inc.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No.91-246: **In re Estate of Gareau.** Motion of appellant to dismiss appeal sustained; appeal dismissed; each party to pay own costs.

No.91-248: **Federal Deposit Ins. Corp. v. DeBoer.** Stipulation allowed; appeal dismissed with prejudice.

No.91-257: **Cole v. Gelvin.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-267: **Nesbitt v. Nebraska Dept. of Corr. Servs.**

Appeals Bd. By order of the court, appeal dismissed for failure to file briefs.

No.91-268: **Bosselman, Inc. v. Nebraska Liquor Control Comm.** Stipulation allowed; appeal dismissed at cost of appellant.

No.91-294: **State v. Herman.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-295: **State v. Wright.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-319: **State v. Caudillo.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-332: **State v. Gray.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-333: **State v. Prahin.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-337: **State v. Prell.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-345: **State v. Brewer.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-347: **State v. Bailey.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-348: **State v. Bellew.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-350: **State v. Williams.** Plea in bar overruled. Cause remanded for further proceedings.

No.91-353: **State v. Williams.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-355: **State v. McKeon.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-356: **State v. Cahalane.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-367: **State v. Skalak.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-377: **State v. Swim.** Affirmed. See Rule 7A(1).

No.91-386: **Frei v. Frei.** By order of the court, appeal dismissed for failure to file briefs.

No.91-392: **State v. Myszkowski.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-393: **State v. Bohanan.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-395: **State v. Curry.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-398: **Kliment v. National Farms, Inc.** Appeal on issue of partial summary judgment dismissed for lack of jurisdiction, no final order. Appeal on issue of new trial summarily affirmed.

No.91-401: **Rickertsen v. Widman Popcorn Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-402: **Skyview Farms v. Widman Popcorn Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-404: **State v. Clemons.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-405: **State v. Clemons.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-406: **State v. Clemons.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-407: **State v. Adams.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-409: **State v. Meeks.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-411: **Blair v. City of Omaha.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No.91-413: **State v. Black.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-414: **State v. Morris.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-417: **Gottula v. Packwood.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-421: **Systems Leasing Trust No. VII v. Holm.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-432: **State v. Rayburn.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-434: **Reinsch v. Reinsch.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-438: **State v. Balderas.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-439: **State v. Davis.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-448: **Stimbert v. Square D Co.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice; each party to pay own costs.

No.91-455: **State v. Spanjer.** Affirmed. See Rule 7A(1).

No.91-456: **Schlupp v. DiGiacomo.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-457: **Kezeor v. Polashek.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No.91-458: **State v. Davis.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-465: **Green v. Green.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No.91-474: **State v. Boppre.** By order of the court, appeal dismissed for failure to file briefs.

No.91-475: **State v. Stubbs.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-476: **State v. Tindle.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-479: **State v. Bryan.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-480: **State v. McCray.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-482: **Federal Land Bank of Omaha v. Rudloff.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-483: **Federal Land Bank of Omaha v. Rudloff.**

Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-484: **Federal Land Bank of Omaha v. Rudloff.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-493: **State v. Rodenbaugh.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-503: **State v. Robinson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-508: **State v. McShannon.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-509: **State v. McShannon.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-511: **State v. Boyle.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2). Appellant to be given credit for 38 days on the sentence for time spent in jail while awaiting sentencing.

No.91-512: **State v. Boyle.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2). Appellant to be given credit for 38 days on the sentence for time spent in jail while awaiting sentencing.

No.91-514: **State v. LaFreniere.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-515: **State v. Sobieszczyk.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-516: **State v. Lehl.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-517: **Hardt v. Hardt.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No.91-519: **State v. Bennett.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-520: **Gallion v. State.** Motion of appellant to dismiss

appeal sustained; appeal dismissed.

No.91-525: **State v. Wright.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-526: **State v. Wright.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-527: **State v. Hanus.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-530: **Cole v. Leech.** By order of the court, appeal dismissed for failure to file briefs.

No.91-531: **Freezer Services, Inc. v. Waller.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No.91-533: **Luna v. Smith-Camp.** By order of the court, appeal dismissed for failure to file briefs.

No.91-534: **Luna v. Smith-Camp.** By order of the court, appeal dismissed for failure to file briefs.

No.91-536: **State v. Nesbitt.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-539: **State v. McDonald.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-555: **State v. Costello.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-556: **State v. Lewis.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-557: **In re Interest of Smith.** By order of the court, appeal dismissed for failure to file briefs.

No.91-558: **State v. Stender.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-560: **In re Interest of Tyler.** By order of the court, appeal dismissed for failure to file briefs.

No.91-561: **In re Interest of Tyler.** By order of the court, appeal dismissed for failure to file briefs.

No.91-562: **In re Interest of Tyler.** By order of the court, appeal dismissed for failure to file briefs.

No.91-563: **State v. Bressman.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-564: **State v. Davis.** Motion of appellee for summary

affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-566: **Novacek v. Hoelscher.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-567: **State v. Wegner.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-568: **State v. Wegner.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-569: **State v. Hansen.** Affirmed. See Rule 7A(1).

No.91-570: **State v. Evans.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-572: **Adler v. City of Omaha.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No.91-574: **State v. Hartshorn.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-575: **State v. Hartshorn.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-576: **State v. Bennett.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-592: **State v. Schrader.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-597: **Russell v. Nelson.** By order of the court, appeal dismissed for failure to file briefs.

No.91-602: **State v. Beam.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-603: **State v. Britt.** Appeal dismissed. See Rule 7A(2).

No.91-607: **State v. Belmarez.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-616: **K-C Drug Co. v. ARA Living Centers of Neb.** Stipulation allowed; appeal dismissed with prejudice; each party to pay own costs.

No.91-618: **State v. Forbes.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No.91-626: **State v. Crawford.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule

7B(2).

No.91-627: **State v. Crawford.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-628: **State v. Crawford.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-631: **State v. Parsons.** Affirmed. See Rule 7A(1).

No.91-637: **State v. Pope.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-638: **Crabb v. Brunswick Corp.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice; each party to pay own costs.

No.91-643: **Spohn v. Hill Aero, Inc.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No.91-644: **Winfrey v. Winfrey.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No.91-651: **Commercial Fed. Bank v. Andersen.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-656: **State v. Jamerson.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-657: **State v. Haman.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-659: **State v. Hipple.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-662: **State v. Lopez.** By order of the court, appeal dismissed for failure to file briefs.

No.91-663: **State v. Beaty.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-667: **State v. Schettler.** Appeal dismissed. See Rule 7A(2).

No.91-671: **State v. Pritchett.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-672: **O'Donnell v. O'Donnell.** By order of the court, appeal dismissed for failure to file briefs.

No.91-673: **Burns v. Hartley.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-684: **Glause v. Glause.** Stipulation allowed; appeal dismissed.

No.91-686: **Warner v. Nebraska Coast, Inc.** By order of the court, appeal dismissed for failure to file briefs.

No.91-687: **State v. James.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-688: **Kiertzner v. Kiertzner.** Appeal dismissed. See Rule 7A(2).

No.91-695: **State v. Hailey.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No.91-697: **State v. Bozack.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-700: **State v. Armendariz.** By order of the court, appeal dismissed for failure to file briefs.

No.91-701: **State v. Hall.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-702: **State v. McCaslin.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-705: **Cundall v. Bellevue Pub. Schools.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No.91-706: **State v. Tichi.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-709: **Tyler v. Morrow.** By order of the court, appeal dismissed for failure to file briefs.

No.91-710: **Wilksen v. Becker.** By order of the court, appeal dismissed for failure to file briefs.

No.91-717: **State v. Alvarado.** Appeal dismissed. See Rule 7A(2).

No.91-724: **Vaida v. Vaida.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-725: **State v. Negley.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No.91-726: **State v. Newby.** By order of the court, appeal dismissed for failure to file briefs.

No.91-727: **State v. McNerny.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-729: **In re Estate of Clark.** By order of the court,

appeal dismissed for failure to file briefs.

No.91-730: **State v. Frye.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-737: **Gundelfinger v. Gundelfinger.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-742: **State v. Wredt.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-748: **State v. Raso.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-752: **State v. Newman.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-753: **State v. Steed.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No.91-754: **State v. Haley.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-755: **State v. Burge.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-760: **State v. Matis.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-764: **Coastal Mart Inc. v. City of Papillion.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No.91-771: **McDonald v. McDonald.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-774: **Doolittle v. Doolittle.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No.91-778: **State v. Bogiot.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-781: **State v. Vaughan.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-782: **State v. Vaughan.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-783: **State v. MacNaughton.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-786: **Clark v. Douglas Cty. Court ex rel. Prochaska.**

Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-789: **State v. Holmes.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-791: **State v. Aken.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-792: **State v. Holmstedt.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-794: **State on behalf of Stevens v. Jasinski.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-798: **Cimino v. FirsTier Bank, N.A.** Appeal dismissed. See Rule 7A(2).

No.91-799: **Faubel v. Faubel.** Motions of appellees for summary dismissal sustained. See Rule 7B(1).

No.91-807: **Renner v. Renner.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No.91-810: **State v. Evans.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-816: **In re Duhon.** Motion of appellee for summary affirmance sustained; judgment affirmed. See Rule 7B(2).

No.91-823: **Jurgens v. Curley's Machine Works.** Stipulation allowed; appeal dismissed with prejudice.

No.91-838: **State v. Ross.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-844: **State v. Kubicek.** Motion of appellant to dismiss appeal sustained; appeal dismissed at cost of appellant.

No.91-845: **State v. Echols.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-852: **State v. Blank.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No.91-877: **American Road Equip. Co. v. Topeka Seed & Stove.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-882: **State v. Moss.** Appeal dismissed. See Rule 7A(2).

No.91-883: **State v. Moss.** Appeal dismissed. See Rule 7A(2).

No.91-884: **In re Interest of Woods.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-896: **Stithem v. Stithem.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No.91-952: **Trierweiler v. Cargo, Inc.** Stipulation allowed; appeal dismissed.

No.91-957: **State v. Manes.** Stipulation allowed; appeal dismissed.

No.91-973: **Camacho v. State.** Motion of appellant to dismiss appeal sustained; appeal dismissed without prejudice.

No.91-979: **Peterson v. Peterson.** Stipulation allowed; appeal dismissed.

No.91-980: **R-D Investment Co. v. Mutual Benefit Life Ins. Co.** Stipulation allowed; appeal dismissed with prejudice.

No.91-1011: **State v. Wells.** Appeal dismissed. See Rule 7A(2).

No.91-1012: **State v. Sayre.** Appeal dismissed. See Rule 7A(2).

No.91-1013: **State v. Mick.** Stipulation allowed; appeal dismissed.

No.91-1041: **State v. Peak.** Appeal dismissed. See Rule 7A(2).

No.91-1043: **Cornhusker Cas. Co. v. Brigham.** Stipulation allowed; appeal dismissed; each party to pay own costs.

No.91-1108: **Liggett v. Nebraska Dept. of Health.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No.91-1116: **White v. Ernst Auto Center.** Motion of appellant to dismiss appeal sustained; appeal dismissed with prejudice at cost of appellant.

No.91-1119: **State v. Palmer.** Appeal dismissed. See Rule 7A(2).

No.91-1121: **State v. Bennett.** Motion of appellant to dismiss appeal sustained; appeal dismissed.

No.91-1130: **McCaslin v. K N Energy, Inc.** Stipulation allowed; appeal dismissed.

No.91-1143: **Strong v. Strong.** Stipulation allowed; appeal dismissed.

No.91-1147: **In re Estate of Dudek.** Motion of appellee for summary dismissal sustained. See Rule 7B(1).

No.91-1180: **State v. Connelly.** Appeal dismissed. See Rule 7A(2).

CASES DETERMINED

IN THE

SUPREME COURT OF NEBRASKA

STATE OF NEBRASKA EX REL. ROBERT M. SPIRE, ATTORNEY GENERAL, AND RONALD L. STASKIEWICZ, COUNTY ATTORNEY OF DOUGLAS COUNTY, NEBRASKA, APPELLEES, V. STRAWBERRIES, INC., A NEBRASKA CORPORATION, ET AL., APPELLANTS.

473 N.W.2d 428

Filed August 30, 1991. No. 89-017.

1. **Injunction: Equity.** An action for injunction sounds in equity.
2. **Declaratory Judgments: Judicial Construction: Statutes.** A declaratory judgment action is an appropriate method to obtain a judicial construction of a statute or determination of a statute's validity, including resolution of a challenge to the constitutionality of the statute.
3. **Equity: Appeal and Error.** In an appeal of an equity action, this court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Constitutional Law: Statutes: Proof.** One claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional.
5. **Constitutional Law: Statutes: Presumptions.** A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
6. **Gaming.** A person commits the offense of possession of a gambling device if he or she manufactures, sells, transports, places, possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody, or use of any gambling device, knowing that it shall be used in the advancement of unlawful gambling activity.

7. **Gaming: Words and Phrases.** A game of chance is one in which the result as to success or failure depends less on the skill and experience of the player than on purely fortuitous or accidental circumstances incidental to the game or the manner of playing it or on the device or apparatus with which it is played.
8. **Constitutional Law: Gaming: Words and Phrases.** A game of chance is one in which the winner is determined by mere luck and not by skill; the predominant nature of the game, i.e., skill or chance, determines its classification. Free replays are things of value and when obtained on a gambling device constitute property within the meaning of Neb. Const. art. III, § 24.
9. **Constitutional Law: Legislature.** The Legislature cannot avoid constitutional provisions by statutorily redefining constitutionally unacceptable activity. The Legislature's power of definition may not be employed to nullify or circumvent the provisions of the Nebraska Constitution.
10. **Constitutional Law: Statutes: Legislature: Intent.** The test to be applied in determining whether an unconstitutional clause may be severed from the remainder of a statute is (1) whether, absent the invalid portions, a workable plan remains; (2) whether the valid portions of an act can be enforced independently, and where the invalid portions do not constitute such an inducement to the valid parts that the valid parts would not have passed without the invalid parts; (3) whether the severance will do violence to the intent of the Legislature; and (4) whether a declaration of separability is included in the act, indicating that the Legislature would have enacted the bill absent the invalid portion.
11. **Constitutional Law: Statutes.** A severability clause in a statute is not a condition precedent to a determination of the question of severability.
12. **Gaming: Nuisances.** Establishments performing gambling-related offenses can constitute public nuisances.
13. **Gaming.** The free replay credits awarded by video gambling machines are a credit or promise involving extension of a service or entertainment and are something of value.
14. **Intent: Circumstantial Evidence: Proof.** The existence of a required intent, knowledge, or other state of mind may be established through circumstantial evidence.
15. **Injunction.** An injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate.
16. **Injunction: Statutes.** Injunction is a proper remedy to be used by the State in the protection of public rights, property, or welfare, whether or not the acts complained of violate a criminal statute or constitute a nuisance.
17. **Injunction: Damages.** Where evidence establishes that an injury will be either continuous or repetitive, granting of an injunction is an appropriate remedy.
18. **Equity: Injunction.** A court of equity may properly afford injunctive relief where there has been a continuing and flagrant course of violations of the law, even though these acts may be subject to criminal prosecution.
19. **Equity: Jurisdiction: Damages.** A court of equity has jurisdiction to enjoin a threatened injury whenever its nature is such that it could not be adequately compensated in damages and its continuance would occasion a constantly

recurring grievance.

20. **Constitutional Law: Public Health and Welfare.** The U.S. Constitution does not recognize an absolute and uncontrollable liberty, and society is free to enact laws against the evils which menace the health, safety, morals, and welfare of people.
21. **Constitutional Law: Gaming.** Prohibiting gambling is a legitimate governmental purpose under the police power.
22. **Appeal and Error.** This court will not consider assignments of error which are not discussed in the proponent's brief.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Michael J. Lehan, of Kelley, Kelley & Lehan, P.C., for appellants.

Robert M. Spire, Attorney General, and William L. Howland; and Ronald L. Staskiewicz, Douglas County Attorney, and Michael W. Amdor for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Strawberries, Inc., and 18 other Douglas County taverns or individuals doing business as taverns appeal a district court judgment (1) permanently enjoining them from possessing or allowing the playing of video gambling devices on their premises and (2) finding Neb. Rev. Stat. § 28-1107(2) (Reissue 1989) unconstitutional.

We hold that § 28-1107(2) violates Neb. Const. art. III, § 24, which prohibits the Legislature from authorizing games of chance, and that the defendants' actions constitute possession of gambling devices under § 28-1107(1). The trial court judgment is affirmed.

STANDARD OF REVIEW

An action for injunction sounds in equity. *Stuthman v. Adelaide D. Hull Trust*, 233 Neb. 586, 447 N.W.2d 23 (1989). A declaratory judgment action is an appropriate method to obtain a judicial construction of a statute or determination of a statute's validity, including resolution of a challenge to the constitutionality of the statute. *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284

(1989). In appellate review of an action for declaratory judgment in an equity action, the standard of review for an equity case applies. *Id.* In an appeal of an equity action, this court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Stuthman, supra.* One claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional. *In re Application A-16642*, 236 Neb. 671, 463 N.W.2d 591 (1990). A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.*

FACTUAL BACKGROUND

The record reveals that in late 1987, officers of the Nebraska State Patrol, the Omaha Police Division, and the Federal Bureau of Investigation (FBI) visited a group of taverns in Douglas County, looking for video gambling devices as part of an investigation launched by the State Attorney General. In each establishment where officers found video gambling devices, they proceeded to play the machines. The testimony of the officers established that most of the games operated in a similar manner. For each 25 cents deposited in a machine, the player would receive credit for one game and could play up to 10 credits at a time. Most of the games displayed a five-card poker hand dealt by a computer mechanism and displayed on a video screen. The player, if dissatisfied with the hand initially dealt, could discard those cards and draw and play additional cards. The player had no control over the cards initially dealt or received after discard. If the poker hand finally held by the player was the equivalent of or better than certain poker hands shown on the face of the game, the player would win one or more credits. The player would receive one additional play for each credit. Other games available on the machines included dice and blackjack. According to testimony of the officers and of an FBI agent, some of the machines in question contained

"knock-off" switches. The FBI agent stated that machines with such switches also contain accounting functions which allow the proprietors to pay off customers who have accumulated credits on the machines, knock off the credits from the machines, and then account for any moneys paid out.

Based upon the investigation, the State filed a petition against 25 business establishments and individuals with liquor licenses in Douglas County, alleging they possessed video gambling devices. The petition claimed that the defendants' actions violated Neb. Const. art. III, § 24, and § 28-1107, and sought as relief a permanent injunction against such actions and a declaration that § 28-1107(2) was unconstitutional. On March 14 and 15, 1988, proceedings were had in the district court for Douglas County, wherein the State sought and received a temporary injunction.

Subsequently, trial proceeded against the defendants on the State's request for a permanent injunction. Six defendants, 1830 Inc., a Nebraska corporation; American Legion Post No. 331; Veterans of Foreign Wars Post No. 8334; James L. Wickstrom, an individual; H.M.C., Inc., a Nebraska corporation; and D. Louis Black, Inc., a Nebraska corporation, consented to the entry of an injunction prohibiting them from possessing and maintaining gambling devices on their premises. On November 1, 1988, the district court found that the possession of video gambling devices constituted a nuisance under § 28-1107(1) and Neb. Const. art. III, § 24, and, further, that § 28-1107(2) was unconstitutional and severable from § 28-1107(1). The district court permanently enjoined the remaining 19 defendants from playing, possessing, returning to, or locating on the premises any video gaming devices. A motion for new trial was overruled, and the 19 defendants timely appealed.

ASSIGNMENTS OF ERROR

The appealing defendants claim that the trial court erred (1) in determining that § 28-1107(2) violated Neb. Const. art. III, § 24, (2) in determining that § 28-1107(1) was severable from § 28-1107(2), (3) in determining that the conduct of the defendants constituted a nuisance under Nebraska

constitutional or statutory law, (4) in entering an injunction, (5) in not determining that Neb. Rev. Stat. §§ 28-1101 et seq. (Reissue 1989) did not violate provisions of the state and federal Constitutions, and (6) in not granting defendants' motion for new trial.

CONSTITUTIONALITY OF § 28-1107(2)

As stated, the trial court determined that § 28-1107(2) violated Neb. Const. art. III, § 24. That constitutional provision provides in pertinent part:

> The Legislature shall not authorize any game of chance, nor any lottery, or gift enterprise when the consideration for a chance to participate involves the payment of money for the purchase of property, services, or a chance or admission ticket or requires an expenditure of substantial effort or time . . . .

This constitutional provision has remained relatively unchanged since 1875. Correspondingly, the statute relating to the "possession of gambling devices" enacted pursuant to this constitutional provision also remained relatively unchanged for 100 years.

Starting in 1973, the Legislature began carving specific exceptions into the statute. A new subsection was added which exempted certain coin-operated machines from operation of the statute. See 1973 Neb. Laws, L.B. 360, and Neb. Rev. Stat. § 28-945(2) (Reissue 1975).

In 1977, Neb. Rev. Stat. ch. 28 (1943) as amended was repealed. The new section relating to the possession of gambling devices provided:

> A person commits the offense of possession of a gambling device if he manufactures, sells, transports, places, possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody, or use of any gambling device, knowing that it shall be used in the advancement of unlawful gambling activity.

§ 28-1107(1) (Supp. 1977). The statute did not initially encompass the exception first created in § 28-945(2). However, this exception was soon added as § 28-1107(2) in 1978 by L.B. 900. In 1979, L.B. 152 made the statute gender neutral and

changed the classification of the crime from a Class I to a Class II misdemeanor.

Finally, in 1987, the Legislature revised subsection (2) of the statute to encompass modern games and eliminate an earlier replay limit:

> This section shall not apply to any coin-operated mechanical gaming device, computer gaming device, electronic gaming device, or video gaming device which has the capability of awarding free games, which is intended to be played and is in fact played for amusement only, and which may allow the player the right to replay such gaming device at no additional cost, which right to replay shall not be considered money or property, except that such mechanical game (a) can be discharged of accumulated free replays only by reactivating the game for one additional play for each accumulated free replay and (b) makes no permanent record directly or indirectly of free replays so awarded. . . .

§ 28-1107(2) (Reissue 1989).

Neb. Const. art. III, § 24, is in clear and unambiguous language and can be divided into three elements: (1) chance: "[t]he Legislature shall not authorize any game of chance"; (2) consideration: "when the consideration for a chance to participate involves the payment of money"; and (3) prize: "for the purchase of property [or] services."

In defining these elements, this court has held that a game of chance is one in which the result as to success or failure depends less on the skill and experience of the player than on purely fortuitous or accidental circumstances incidental to the game or the manner of playing it or on the device or apparatus with which it is played. *Indoor Recreation Enterprises, Inc. v. Douglas*, 194 Neb. 715, 235 N.W.2d 398 (1975). See, also, *CONtact, Inc. v. State*, 212 Neb. 584, 324 N.W.2d 804 (1982) (a game of chance is one in which the winner is determined by mere luck and not by skill; the predominant nature of the game, i.e., skill or chance, determines its classification). Free replays are things of value and when obtained on a gambling device constitute property within the meaning of Neb. Const. art. III, § 24. *Baedaro v. Caldwell*, 156 Neb. 489, 56 N.W.2d 706 (1953).

Section 28-1107(2) attempts to exempt devices which would normally fall under the "games of chance" prohibition by redefining them. Subsection (2) provides that subsection (1) shall not apply to games used for amusement only and also attempts to exclude free replays from being considered as property under the "prize" element. Neb. Const. art. III, § 24, is clear. This court has already ruled that free replays on a device otherwise considered a gambling device constitute property within the meaning of the prohibition.

The Legislature cannot avoid constitutional provisions by statutorily redefining constitutionally unacceptable activity. The Legislature's power of definition may not be employed to nullify or circumvent the provisions of the Nebraska Constitution. *MAPCO Ammonia Pipeline v. State Bd. of Equal.*, 238 Neb. 565, 471 N.W.2d 734 (1991). To redefine the activity that the Legislature seeks to permit would require an amendment to this state's Constitution. Absent such an amendment, § 28-1107(2) is unconstitutional for being in contravention of the express provision of Neb. Const. art. III, § 24.

SEVERABILITY OF § 28-1107(1)

We next determine whether § 28-1107(1) is severable from § 28-1107(2). The test to be applied in determining whether an unconstitutional clause may be severed from the remainder of a statute is (1) whether, absent the invalid portions, a workable plan remains; (2) whether the valid portions of an act can be enforced independently, and where the invalid portions do not constitute such an inducement to the valid parts that the valid parts would not have passed without the invalid parts; (3) whether the severance will do violence to the intent of the Legislature; and (4) whether a declaration of separability is included in the act, indicating that the Legislature would have enacted the bill absent the invalid portion. *Ewing v. Scotts Bluff Cty. Bd. of Equal.*, 227 Neb. 798, 420 N.W.2d 685 (1988). The first three elements of this test are clearly met because subsection (2) was first added to § 28-1107 as a 1978 amendment. Section 28-1107(1) was enacted independently in 1977. The fact that § 28-1107(2) was not enacted with a

severability clause is not fatal to a conclusion that this subsection is severable from the remainder of the statute. A severability clause in a statute is not a condition precedent to a determination of the question of severability. *Ewing, supra.* Enacting § 28-1107(1) independently of subsection (2) clearly evidences the Legislature's intent to enact the bill absent the invalid portion. Section 28-1107(2) may properly be severed from the remainder of the statute.

CONDUCT OF THE DEFENDANTS AS A NUISANCE

In their third assignment of error, the defendants claim that the trial court erred in determining that their conduct constituted a public nuisance under Nebraska constitutional or statutory law. "A public nuisance is an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B at 87 (1979). Circumstances that may sustain a holding that such interference is unreasonable include whether the conduct is proscribed by statute. *Id.*; Prosser and Keaton on the Law of Torts, *Nuisance* § 90 at 643-44 (5th ed. 1984) (public nuisance "comprehends a miscellaneous and diversified group of minor criminal offenses, based on some interference with the interests of the community [and] includes interferences with . . . public morals").

This court has consistently held that establishments performing gambling-related offenses can constitute public nuisances. See, *City of Omaha v. Danner*, 186 Neb. 701, 185 N.W.2d 869 (1971) (establishment was public nuisance because of various activities, including gambling); *State ex rel. Carlson v. Hatfield*, 183 Neb. 157, 158 N.W.2d 612 (1968) (establishment was a gathering place for gamblers); *State ex rel. Johnson v. Hash*, 144 Neb. 495, 13 N.W.2d 716 (1944) (places where gambling is publicly and continuously permitted are public nuisances); *State, ex rel. Hunter, v. The Araho*, 137 Neb. 389, 289 N.W. 545 (1940) (a place kept for gambling purposes is a public nuisance); *Hill v. Pierson*, 45 Neb. 503, 63 N.W. 835 (1895) (a gambling house is a public nuisance).

The defendants contend that no criminal offenses were committed because their conduct did not violate § 28-1107(1).

Repeated again, that section provides:

> A person commits the offense of possession of a gambling device if he or she manufactures, sells, transports, places, possesses, or conducts or negotiates any transaction affecting or designed to affect ownership, custody, or use of any gambling device, knowing that it shall be used in the advancement of unlawful gambling activity.

The elements relative to the defendants, and those which the State must prove exist by a preponderance of the evidence, see *Uhing v. City of Oakland*, 236 Neb. 58, 459 N.W.2d 187 (1990), are that the defendants (1) possessed a gambling device (2) knowing it would be used in the advancement of unlawful gambling activity. In regard to the first element, the defendants do not dispute that they possessed the devices in question, but, rather, they claim that the machines in question are not gambling devices.

As relevant to the machines seized in this action, "gambling device" is defined as

> any device, machine, paraphernalia, writing, paper, instrument, article, or equipment that is used or usable for engaging in gambling, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine. Gambling device shall also include any mechanical gaming device, computer gaming device, electronic gaming device, or video gaming device which has the capability of awarding something of value . . . .

§ 28-1101(5). This definition necessarily requires further deference to the definition of "gambling," which is defined in pertinent part as when "[a] person . . . bets something of value upon the outcome of a future event, which outcome is determined by an element of chance . . . ." § 28-1101(4).

Defendants argue that players of these devices do not bet something of value on the future outcome of an event, but, rather, a player "merely buys the right to possess the machine according to certain terms, one of which is the possibility of longer play depending upon the outcome of the machine's operation." Brief for appellants at 26. A similar argument was rejected in *State v. Two IGT Video Poker Games*, 237 Neb. 145,

152, 465 N.W.2d 453, 459 (1991), wherein this court stated:

> The 25 cents used to activate the machines is clearly something of value. The free replay credits awarded by the machines are a credit or promise involving extension of a service or entertainment and are something of value. [Citations omitted.] The player of the game is betting his or her 25 cents (or accumulated replay credits) on the outcome of the play, while the machine is betting an extension of entertainment. Both parties are therefore betting something of value on the outcome, which is determined by an element of chance.

None of the remaining exceptions to § 28-1101(4) are relevant here. Absent an exception, the seized devices are "gambling devices" within the meaning of the statute.

The final element of § 28-1107(1) is whether the defendants "knew" the devices were being used in the advancement of unlawful gambling activity. The existence of a required intent, knowledge, or other state of mind may be established through circumstantial evidence. *Two IGT Video Poker Games, supra*; *State v. Ayres*, 236 Neb. 824, 464 N.W.2d 316 (1991). As stated in *Two IGT Video Poker Games*, playing these machines qualifies as engaging in gambling activity. The fact that the devices were seen in bars being played by patrons evidences a knowledge that the defendants knew that these machines, having no other purpose except as "gambling devices," were used in gambling activity. The evidence was sufficient to prove that the defendants violated § 28-1107(1).

INJUNCTION AS PROPER REMEDY

An injunction will not lie unless the right is clear, the damage is irreparable, and the remedy at law is inadequate. *Young v. Lacy*, 221 Neb. 511, 378 N.W.2d 192 (1985). Based on the foregoing analysis there is no question that the State's right to an injunction is clear. The defendants dispute whether there was irreparable damage or no adequate remedy at law.

Injunction is a proper remedy to be used by the State in the protection of public rights, property, or welfare, whether or not the acts complained of violate a criminal statute or constitute a nuisance. *State ex rel. Meyer v. Weiner*, 190 Neb. 30, 205

N.W.2d 649 (1973). Violations of these public rights can constitute irreparable damage.

Where evidence establishes that an injury will be either continuous or repetitive, granting of an injunction is an appropriate remedy. *Delp v. Laier*, 205 Neb. 417, 288 N.W.2d 265 (1980). A court of equity may properly afford injunctive relief where there has been a continuing and flagrant course of violations of the law, even though these acts may be subject to criminal prosecution. *State ex rel. Douglas v. Wiener*, 220 Neb. 502, 370 N.W.2d 720 (1985). There is no question that the conduct in question is pervasive. The record reveals that approximately 80 percent of all establishments licensed to sell liquor in Douglas County have similar machines. Such pervasiveness can constitute a continuing and flagrant course of violations. The violations need not be from a single establishment. Repeated criminal prosecutions would not provide an adequate remedy to eradicate the nuisance.

Finally, a court of equity has jurisdiction to enjoin a threatened injury whenever its nature is such that it could not be adequately compensated in damages and its continuance would occasion a constantly recurring grievance. *City of Syracuse v. Farmers Elevator, Inc.*, 182 Neb. 783, 157 N.W.2d 394 (1968). This precisely reflects the conduct in question.

CONSTITUTIONAL VIOLATIONS

The defendants claim that the trial court erred in not determining that §§ 28-1101 et seq., the Nebraska statutory sections relating to gambling, did not violate provisions of the state and federal Constitutions. Specifically, the defendants contend (1) that their liberty interests protected by Neb. Const. art. I, §§ 1 and 26, and U.S. Const. amends. V and XIV have been impaired by Nebraska's gambling statutes and (2) that the term "used or usable" in § 28-1101(5), which defines "gambling device," is overbroad in violation of Neb. Const. art. I, §§ 1 and 3, and U.S. Const. amends. V and XIV.

The defendants concede that

> [t]he [U.S.] constitution does not recognize an absolute and uncontrollable liberty and society is free to enact laws against the evils which menace the health, safety, morals

> and welfare of people. See, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, [57 S. Ct. 578, 81 L. Ed. 703] (1937). However, "liberty" protected by the due process clause of the Fourteenth Amendment may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. See, *Meyer v. Nebraska*, [262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1923)].

Brief for appellants at 34. See, also, *Idaho Health Care Ass'n v. Sullivan*, 716 F. Supp. 464 (D. Idaho 1989); *Kaltenbach v. Breaux*, 690 F. Supp. 1551 (W.D. La. 1988).

This argument was answered in *State v. Two IGT Video Poker Games*, 237 Neb. 145, 150, 465 N.W.2d 453, 458 (1991), wherein this court stated: "Prohibiting gambling is a legitimate government purpose under the police power. [Citations omitted.] Prohibiting the possession or use of gambling devices is rationally related to preventing gambling . . . . Therefore, the statutes in question are a valid exercise of the State's police power."

Again, under Nebraska law, a "gambling device" is defined as

> any device, machine, paraphernalia, writing, paper, instrument, article, or equipment that is *used or usable for engaging in gambling*, whether that activity consists of gambling between persons or gambling by a person involving the playing of a machine. Gambling device shall also include any mechanical gaming device, computer gaming device, electronic gaming device, or video gaming device which has the capability of awarding something of value . . . .

§ 28-1101(5). The defendants take issue that the term "used or usable for engaging in gambling" is overbroad both facially and as applied to these defendants and is thus violative of Neb. Const. art. I, §§ 1 and 3, and U.S. Const. amends. V and XIV.

A statute may be unconstitutional by being overbroad in the sense that it prohibits the exercise of constitutionally protected conduct. See *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987). In essence, the defendants contend that almost any item

is *usable* for gambling under the statute's definition of a "gambling device."

This court need not go into great detail to resolve this issue because the defendants both ask and answer their own question. The defendants state that "[b]y reading the 'bet' requirement of §28-1101(4) into §28-1101(5), the overbreadth problem is solved." Brief for appellants at 41. This is precisely how the statute does not infringe on protected conduct. Since this court has ruled that a "bet" was or could be involved in the use of these machines, the machines in question properly fit within the definition of "gambling devices."

MOTION FOR NEW TRIAL

Although the defendants have assigned as error the trial court's refusal to sustain their motion for new trial, they fail to discuss that issue in their brief. Errors assigned but not discussed will not be considered by the Supreme Court. *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991); *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991).

CONCLUSION

The errors assigned by the defendants are without merit or have not been discussed. This court will not consider assignments of error which are not discussed in the proponent's brief. *State v. Bonczynski*, 227 Neb. 203, 416 N.W.2d 508 (1987). The trial court judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MATTHEW C. CAMPBELL, APPELLANT.

473 N.W.2d 420

Filed August 30, 1991. No. 90-392.

1. **Criminal Law: Sexual Assault.** Consent or reasonable mistake as to the age of the victim is not a defense to first degree sexual assault on a child.
2. **Criminal Law: Sexual Assault: Evidence.** In a charge of sexual assault on a child, evidence on the issue of the child's chastity is irrelevant and inadmissible.

3. **Trial: Witnesses: Motions for Continuance: Appeal and Error.** To obtain a reversal on the ground of endorsement of an additional witness, the defendant must have requested a continuance at trial.
4. **Trial: Testimony: Motions to Strike: Appeal and Error.** One who fails to object to or move to strike testimony may not predicate error on its admission.
5. **Convictions: Testimony: Proof.** A defendant's conviction of a crime may be based on uncorroborated testimony of an accomplice.
6. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to sustain a conviction, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence.
7. **Motions for New Trial: Appeal and Error.** A motion for new trial on the basis of newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed.
8. **Trial: Evidence: Motions to Suppress: Waiver: Appeal and Error.** A failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.
9. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Richard B. Register for appellant.

Robert M. Spire, Attorney General, and Kenneth W. Payne for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

On December 19, 1989, a four-count information was filed in the Douglas County District Court, charging defendant, Matthew C. Campbell, with (1) first degree sexual assault on a child, in violation of Neb. Rev. Stat. § 28-319(1)(c) (Reissue 1989); (2) burglary, in violation of Neb. Rev. Stat. § 28-507 (Reissue 1989); (3) robbery, in violation of Neb. Rev. Stat. § 28-324 (Reissue 1989); and (4) theft by unlawful taking, in violation of Neb. Rev. Stat. § 28-511 (Reissue 1989). Defendant was tried before a jury on February 14 and 15, 1990. Count IV, theft by unlawful taking, was dismissed by order of

the court before the case was submitted to the jury. The jury returned guilty verdicts on the other three counts. Defendant's motion for a new trial was denied. After a sentencing hearing, defendant was sentenced to the Nebraska Department of Correctional Services. He was sentenced to 2 years for first degree sexual assault on a child, with credit for time served; 2 years for burglary, to run concurrently with the sentence for sexual assault, with credit for time served; and 10 to 15 years for robbery, to run consecutively to the first two counts. Defendant timely appealed. His brief before this court contains 13 assignments of error. We affirm.

The record shows the following: On June 19, 1989, Campbell, born April 12, 1969, met Melissa Kinnear, a mature-looking 14-year-old girl. At the time Kinnear was staying with a 25-year-old woman, Joella Spencer, who was dating a friend of the defendant's. Spencer testified that she was under the belief that Kinnear was 18 years old and that she had known Kinnear to drive an automobile and to purchase liquor with false identification. Kinnear testified that shortly after she met the defendant, they had a long conversation during which she told him her actual age.

Kinnear testified that she began dating the defendant about 2 weeks after they first met and that they had consensual sexual intercourse several times over the next few weeks. Kinnear had previously dated a 23-year-old man before she began seeing the defendant.

On July 6, 1989, Kinnear's stepmother, Mary Vassar, was robbed. Kinnear testified that she, the defendant, and a friend named Earl Campbell (apparently not related to defendant) committed the robbery. Kinnear testified that under the plan devised by the parties, she was to go in and make conversation with her stepmother, and then a few minutes later the others were to enter. Kinnear said that on their way to her stepmother's house, the defendant had broken off a stick, which he told Earl Campbell to wrap in a towel so that it looked like a handgun.

Vassar testified that a few minutes after she let Kinnear into the house, Earl Campbell entered and put the cloth-covered stick, which she thought was a gun, to her head. At the time, Vassar was breast-feeding her infant child (Kinnear's half

brother). Earl Campbell called Vassar vulgar names and forced her into a bedroom and demanded her money. Kinnear testified that Vassar's purse was taken and that defendant left Vassar's home with the purse and a radio. All three parties then fled. Vassar testified that she saw only one man at the time of the robbery, but that it was possible that another could have entered. She testified that she had seen Kinnear in the neighborhood with two young men a few hours earlier that day.

Kinnear testified that after they removed money and some food stamps, the defendant threw the purse into a nearby garbage can. She witnessed the defendant ask two women on a porch if they wanted to buy any food stamps, and saw him enter their home when they agreed to do so. She testified that he told her that he received $50 in cash for 100 dollars' worth of the stolen food stamps.

On July 10, 1989, Vassar returned home to discover that her home had been broken into and more items had been stolen. She saw that a window screen had been removed and that she was missing a television, a microwave oven, a telephone, a camera, clothing, and jewelry. A neighbor testified that the previous evening he had observed Kinnear and two men walking up the street. One of the men was carrying a television on his back, and the other was carrying a couple of filled garbage bags.

Kinnear testified that before the burglary just described, she, the defendant, and another friend, Todd Williams, decided to see what other items of value they could steal from the Vassar home. She testified that she waited in the car and did not see the two men enter the home, but that the defendant later told her that he kicked in the window screen to gain entry. She testified that the defendant left the house with the television and a bag full of other items and that Williams took the microwave and another bag. Kinnear testified that she carried a bag as well. She said that the bags contained jewelry, clothes, and a telephone. She testified that the three of them then traveled a few blocks to a place where they sold the microwave.

A few days later, July 14, 1989, the defendant and Kinnear again returned to the Vassar home, this time accompanied by Tyrone Gresham. Kinnear testified that they wanted a car to

drive around and that she remembered Vassar's Fairmont could be started without a key. She and Gresham both testified that Gresham wrapped his sweater around a rock, and he testified that the defendant then hurled the rock through the window so that they could unlock the car. Gresham testified that they intended to drive the car until it ran out of gas. They then drove to Spencer's home, according to Kinnear, to get some "tapes" to play in the car's stereo. The car would not start again after the ignition was shut off, however, so the two men pushed the car around the corner and abandoned it.

At the close of the State's case, defendant moved that the count for theft by unlawful taking be dismissed because both Kinnear and Gresham testified that there was no intent to permanently deprive the owner of the vehicle of possession of the car. The court reserved ruling until the close of defendant's case, and then dismissed that count pursuant to the motion. The court denied certain jury instructions and certain other motions by the defendant before submission of the case to the jury. The jury returned guilty verdicts on the other three counts.

Defendant filed a motion for new trial, based in part on a handwritten letter allegedly authored by Kinnear. The letter was received by the judge on March 9, 1990. A similar letter was mailed to defendant's mother on March 12, 1990. The letters stated that Kinnear wanted to tell the truth that defendant had not committed the crimes, so that he would not be "put away." Kinnear testified at the hearing on the motion that she did not write the letters and that she had told the truth at trial. The court denied the motion and refused defendant's motion to have an independent handwriting analysis of the letter.

Appellant assigns 13 errors in his appeal. Two of them concern defenses available to a defendant over 19 years old charged with sexual assault of a victim less than 16. The first is that the trial court erroneously refused to allow the defense of defendant's reasonable mistake as to the age of the victim of the "statutory rape" charge. The related assignment is that the court erred in rejecting a "proffered jury instruction for active concealment or misrepresentation to the charge of Statutory Rape."

Section 28-319(1)(c) states: "Any person who subjects

another person to sexual penetration and . . . the actor is nineteen years of age or older and the victim is less than sixteen years of age is guilty of sexual assault in the first degree."

This court has held that consent or reasonable mistake as to the age of the victim is not a defense to first degree sexual assault on a child. *State v. Navarrete*, 221 Neb. 171, 376 N.W.2d 8 (1985). We, like most American jurisdictions, have expressly rejected the "California Rule," allowing a defense of reasonable mistake. *Id.*

Neither does the statute exculpate a perpetrator where the victim has engaged in "active concealment or misrepresentation" of age. Absent such a provision, we do not read it into the statute. We have stated:

> "It is not violative of due process for the Legislature, in framing its criminal laws, to cast upon the public the duty of care or extreme caution. Nor is it unfair to require one who gets perilously close to an area of proscribed conduct to take the risk that he may cross over the line."

State v. Navarrete, supra at 175, 376 N.W.2d at 11.

It is not unreasonable to require that a person about to engage in sexual penetration take into account the possibility of misrepresentation of the age of a prospective partner. The trial court did not err in refusing to give an exculpatory jury instruction on that basis.

It should also be noted that Kinnear testified that she told the defendant that she was 14. The defendant did not testify at trial or offer any evidence at trial to contradict that testimony, and the jury could reasonably have accepted her testimony as fact.

Defendant also assigns as error the court's refusal "to allow the Defendant the opportunity to present evidence and limit questions of the prior sexual history of the 'victim.' " Section 28-319(1)(c) includes no requirement of chastity or lack of consent. In a charge of sexual assault on a child, evidence on the issue of the child's chastity is irrelevant and inadmissible. Plaintiff's argument on this issue is without merit, and the trial court did not err in this regard.

Defendant then asserts that "[t]he trial Court erred in allowing the endorsement of [a] witness on the day of trial as clear harm was shown to the Defendant's position." One of the

State's witnesses was Gresham. The court allowed Gresham to be endorsed as a witness on the day of trial. Defendant was certainly aware of the witness because he had subpoenaed Gresham. The court allowed a recess, for "however long it takes," so that defendant's counsel could interview Gresham before he took the stand for the State. At no time did defendant request a continuance.

This court has held that to obtain a reversal on the ground of endorsement of an additional witness, the defendant must have requested a continuance at trial. *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990); *State v. Ellis*, 223 Neb. 779, 393 N.W.2d 719 (1986). No continuance was requested in this case. The assignment is without merit.

Defendant next contends that "the trial Court erred by allowing the testimony of Tyrome Gesham [sic] and failing to instruct the jury to disregard his testimony when the only competent evidence of the witness related to the dismissed charge." It first should be noted that Gresham testified not only to the dismissed charge, but that he observed the defendant laughing while the defendant and Kinnear discussed a past burglary. More importantly, however, despite his objection to Gresham's endorsement, defendant failed to object to Gresham's testimony, and thoroughly cross-examined the witness. Defendant did not move to strike any of Gresham's testimony. One who fails to object to or move to strike testimony may not predicate error on its admission. *Uryasz v. Archbishop Bergan Mercy Hosp.*, 230 Neb. 323, 431 N.W.2d 617 (1988); *Pauley Lumber Co. v. City of Nebraska City*, 190 Neb. 94, 206 N.W.2d 326 (1973). Defendant cannot complain that the court should not have allowed Gresham to testify, on the basis that his testimony was relevant only to the dismissed charge, when it was not until after Gresham testified that defendant moved to dismiss the charge of theft by unlawful taking.

In addition, defendant did not move that the jury be instructed to disregard Gresham's testimony, nor did defendant ever offer any instruction in that regard.

> A party who desires an instruction on some particular question should request it. When the general charge fairly

> presents the case to the jury, error cannot be predicated on a failure to instruct on some particular phase of the case unless a proper instruction has been requested by the party complaining.

State v. Lynch, 196 Neb. 372, 376-77, 243 N.W.2d 62, 65-66 (1976). See, also, *State v. Huffman*, 222 Neb. 512, 385 N.W.2d 85 (1986). This assignment is without merit.

Defendant next contends that "the trial Court erred in failing to dismiss the charge of auto theft at the commencement of the trial." Defendant made no pretrial motion to dismiss the charge. It was only after the testimony of Kinnear and Gresham on the stand that it appeared that the parties may have been merely joyriding in the vehicle of the victim from whom they had twice previously stolen. This assignment is frivolous.

The next error assigned by defendant is that "the trial Court erred by failing to provide a fair trial to the Defendant, by not controlling or admonishing the actions of the prosecutor in intimidating the State's main witness." Defendant called Dorothy Brummet, a paralegal in the office of defendant's attorney, to testify on defendant's behalf. Brummet testified that Kinnear told her shortly before defendant's preliminary hearing that defendant was not guilty and that she did not want to testify against him. Brummet testified that sometime following that encounter, while sitting in the courtroom waiting for defendant's preliminary hearing, she heard loud voices coming from a side room. Brummet testified that Kinnear emerged from the room and appeared shaken and that Kinnear then proceeded to testify against defendant at the hearing.

At trial Kinnear was cross-examined with regard to the veracity of her statements at the preliminary hearing. She testified that she had told the truth and that any previous inconsistent statements she had made were due to her desire to protect the defendant.

There was no evidence that the judge at the preliminary hearing was even aware of the alleged intimidation, and thus it cannot be said that the trial court erred in failing to control or admonish the prosecutor. The question as to whether there was any impropriety on the part of the prosecutor was a question of fact. Defendant was allowed to bring evidence of the alleged

intimidation before the jury at trial, and the jury was able to take that evidence into account when considering the weight and credibility to be attributed to Kinnear's testimony. The jury nonetheless found that the evidence was sufficient to find defendant guilty beyond a reasonable doubt. The trial court did not err in this regard.

Defendant's next assignment of error maintains that as a matter of law, "the judgment and verdict of the jury was not supported by sufficient evidence." It is true that the State's case depends heavily upon the testimony of Kinnear, who admitted that she had made prior inconsistent statements. However, although prior contradictory statements may cause the jury to doubt the account of facts testified to at trial, generally such prior statements do not negate, erase, or eradicate the evidence that a certain fact exists. *State v. Schenck*, 222 Neb. 523, 384 N.W.2d 642 (1986). This court has long held that a defendant's conviction may be based on uncorroborated testimony of an accomplice. In *State v. Loveless*, 234 Neb. 463, 467, 451 N.W.2d 692, 694 (1990), we said:

> Loveless acknowledges the longstanding Nebraska rule that a defendant's conviction of a crime may be based on uncorroborated testimony of an accomplice. *State v. Burchett*, 224 Neb. 444, 399 N.W.2d 258 (1986); *State v. Huffman*, 222 Neb. 512, 385 N.W.2d 85 (1986); *Bartlett v. State*, 115 Neb. 148, 211 N.W. 994 (1927). We affirm the foregoing rule concerning an accomplice's testimony.

We note that the crimes of sexual assault and burglary are corroborated by testimony of various witnesses, including Vassar, Gresham, Kinnear, and Al Grill, a neighbor of Vassar's. It is only as to the charge of robbery that defendant contends the evidence is insufficient because it is uncorroborated. Defendant's contention is that "Ms. Kinnear's testimony [is] so inconsistent and unbelievable, that alone, without corroboration, should not as a matter of law be sufficient for conviction of robbery." Brief for appellant at 43. To so hold would violate our longstanding rule that credibility of witnesses is for the jury.

To aid the jury in making its determinations of the credibility of Kinnear and of the sufficiency of the evidence, the trial court

fully and properly instructed the jury in the manner approved in *State v. Loveless, supra*, as follows:

> The State has adduced testimony from claimed accomplices. Their testimony should be closely scrutinized for any possible motives for falsification, and if you find that they have testified falsely in regard to any material matter, you should be hesitant to convict upon their testimony without corroboration, and in no case should you convict the defendant unless you are satisfied of his guilt from the evidence beyond a reasonable doubt.

The jury found the evidence sufficient to convict defendant beyond a reasonable doubt of all three counts. In determining the sufficiency of the evidence to sustain a conviction, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Such matters are for the finder of fact, and the verdict of the jury must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *State v. Grell*, 233 Neb. 314, 444 N.W.2d 911 (1989); *State v. Botts*, 232 Neb. 802, 442 N.W.2d 384 (1989). Taking the view most favorable to the State, there is sufficient evidence to support defendant's convictions. Defendant's assignment of error in this regard is without merit.

Defendant's next assignment of error is that "the dismissal and refiling of criminal charges should not extend the Statutory period for speedy trial." This issue was not argued in the lower court. This court will not consider an issue raised for the first time in this court. *State v. West*, 238 Neb. 939, 473 N.W.2d 81 (1991).

The next two assignments by the defendant allege that "the trial Court erred in refusing to grant the Defendant's Motion for a new trial based on the letter reported to be written by the State's main witness" and that "the trial Court erred in denying defense motion for independent handwriting analysis of the letter reported to be written by the State's main witness." We have held that a motion for new trial on the basis of newly discovered evidence is addressed to the discretion of the trial court, and unless an abuse of discretion is shown, the trial court's determination will not be disturbed. *Waite v. A. S.*

Battiato Co., 238 Neb. 151, 469 N.W.2d 766 (1991); *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991). Applications for new trial are to be entertained with reluctance and granted with caution. *Waite, supra*. Sitting as the sole judge of the credibility of the witness and the relevance of the newly discovered evidence, the trial judge obviously found the letter to be forged. The judge heard Kinnear's testimony to that effect, and he compared the letter to other statements in evidence which were handwritten by Kinnear. There was no error in the court's denying the motion for new trial, or in the court's refusal to allow defendant the opportunity to present a handwriting expert to assist the court in its determination.

Defendant next assigns as error the trial court's refusal to suppress a statement he made after his arrest. In response to an officer's comment that Kinnear might be pregnant, defendant allegedly said, "Yeah, I know." After a hearing on the matter pursuant to a pretrial motion, the court found that the statement "was volunteered during the first interview during the time the defendant was being advised of his constitutional rights." Officer Robert Mjeldheim testified at trial that defendant made the statement to him. Defendant failed to renew his objection. A failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal. *State v. Cogswell*, 237 Neb. 769, 467 N.W.2d 680 (1991).

Defendant's final assignment of error claims that the sentence imposed on the defendant for robbery was excessive. Defendant was sentenced to 10 to 15 years on the robbery charge. This sentence was within the statutory limits. A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *State v. Lixey*, 238 Neb. 540, 471 N.W.2d 444 (1991). In addition, this was a particularly offensive series of crimes. The small group of young hoodlums robbed a mother nursing her infant child, and then returned a few days later to finish the job and inflict further financial damage on a decent citizen. This defendant was an integral part of the group. Given defendant's criminal record and the seriousness of the offense,

the trial court did not abuse its discretion.

The jury's verdicts and the sentences of the trial court are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOEL L. HECKMAN, APPELLANT.

473 N.W.2d 416

Filed August 30, 1991. No. 90-934.

1. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed.
2. **Sentences.** Where the imposed sentence of imprisonment is the statutory maximum for the offense, the sentencing court must give the defendant credit for jail time.
3. **Sentences: Words and Phrases.** "Jail time" is commonly understood to be the time an accused spends in detention pending trial and sentencing.
4. **Sentences.** Credit against the maximum term and any minimum term shall be given to an offender for time spent in custody *as a result of the criminal charge for which a prison sentence is imposed* or as a result of the conduct on which such a charge is based. This shall specifically include, but shall not be limited to, time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to delivery of the offender to the custody of the Department of Correctional Services.
5. **Statutes: Appeal and Error.** In construing statutes, the Supreme Court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
6. **Sentences.** The purpose of jail time credit under Neb. Rev. Stat. § 83-1,106 (Cum. Supp. 1990) is to avoid the situation where one convicted of a crime is incarcerated for a period greater than the maximum term of years prescribed as punishment for the particular offense.
7. **Statutes: Presumptions: Legislature: Intent.** In construing a statute, it is presumed that the Legislature intended sensible, rather than absurd, results.

Appeal from the District Court for Pierce County: MERRITT C. WARREN, Judge. Affirmed as modified.

Mark D. Albin for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Dissatisfied with (1) the trial court's failure to give him credit for the time he spent in jail awaiting final disposition of his case involving three crimes and (2) the commencement date of the suspension of his driving privileges, Joel L. Heckman appeals to this court, complaining that his sentences are excessive.

We hold that Heckman should have received 6 days' credit on his sentences and affirm the judgment of the trial court in all other respects.

A sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed. *State v. Gibbs*, 238 Neb. 268, 470 N.W.2d 558 (1991). Where the imposed sentence of imprisonment is the statutory maximum for the offense, the sentencing court must give the defendant credit for jail time. *State v. Vrtiska*, 227 Neb. 600, 418 N.W.2d 758 (1988). "Jail time" is commonly understood to be the time an accused spends in detention pending trial and sentencing. *State v. Fisher*, 218 Neb. 479, 356 N.W.2d 880 (1984).

On February 15, 1990, a Pierce County deputy sheriff responded to a report of an automobile in a ditch 4 miles north of Pierce, Nebraska. Upon arrival, the deputy sheriff found the driver, Heckman, waiting for assistance. Heckman smelled of alcohol, and he had slurred speech. A preliminary breath test of Heckman showed he was intoxicated. He was placed under arrest and transported to the sheriff's office. A subsequent inventory search of Heckman's car revealed a briefcase which contained a loaded pistol.

Heckman was charged in a three-count information in the district court for Pierce County. The counts were (1) possession of a firearm by a felon, a Class IV felony, see Neb. Rev. Stat. § 28-1206 (Reissue 1989), which carries a penalty of up to 5 years' imprisonment, up to a $10,000 fine, or both, see Neb. Rev. Stat. § 28-105 (Reissue 1989); (2) possession of a concealed weapon, a Class I misdemeanor, see Neb. Rev. Stat. § 28-1202(1) and (3) (Reissue 1989), which carries a penalty of

not more than 1 year's imprisonment, up to a $1,000 fine, or both, see Neb. Rev. Stat. § 28-106 (Reissue 1989); and (3) second-offense driving while under the influence of alcoholic liquor, a Class W misdemeanor, see Neb. Rev. Stat. § 39-669.07 (Reissue 1988), which carries a mandatory 30 days' imprisonment and a $500 fine, see § 28-106, and an order that such person not drive any motor vehicle for any purpose for a period of 1 year and an operator's license revocation for a like period, such revocation not to run concurrently with any jail term, see § 39-669.07(b).

On June 11, 1990, Heckman entered a guilty plea to each count of the information before the district court for Pierce County, under terms of a plea agreement. The district court accepted the pleas and adjudged the defendant guilty on each count in the information. Heckman had spent 6 days in jail prior to his release on bond. A sentencing hearing was to be held July 9, but Heckman failed to appear. On August 13, a bench warrant was issued for his arrest, but it was stayed until August 14 to give the defendant a chance to appear. Heckman did not appear and was subsequently arrested on August 15.

On August 22, 1990, Heckman was sentenced on count I, possession of a firearm by a felon, to not less than 20 nor more than 60 months' imprisonment and on count II to 1 year's imprisonment, to be served concurrently with the sentence in count I. On count III, the defendant was sentenced to 30 days' imprisonment, to be served concurrently with the sentences in counts I and II, fined $500, and ordered not to drive a motor vehicle for 1 year from the date of his release from incarceration. Heckman's motor vehicle operator's license was revoked for a like period. The prison sentence imposed on each count is the maximum sentence of incarceration provided by statute for each offense.

Heckman's first assignment of error is that the trial court failed to allow credit for the 6 days first served in jail after his initial arrest and the 7 days served in jail following his second arrest, after failing to appear. The applicable statute is Neb. Rev. Stat. § 83-1,106(1) (Cum. Supp. 1990), which provides:

> Credit against the maximum term and any minimum term shall be given to an offender for time spent in custody *as a*

> *result of the criminal charge for which a prison sentence is imposed* or as a result of the conduct on which such a charge is based. This shall specifically include, but shall not be limited to, time spent in custody prior to trial, during trial, pending sentence, pending the resolution of an appeal, and prior to delivery of the offender to the custody of the Department of Correctional Services.

(Emphasis supplied.)

In construing statutes, the Supreme Court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990). It is clear that the only charges for which prison sentences were imposed were the initial three charges of possession of a firearm by a felon, possession of a concealed weapon, and second-offense driving while intoxicated. Heckman was arrested on February 15, 1990, for these charges, and according to his presentence investigation report, dated August 1, the defendant spent 6 days in jail. When Heckman was arrested on August 15, 1990, the charge was failure to appear when ordered, which is a separate Class IV felony. See Neb. Rev. Stat. § 29-908 (Reissue 1989). There was no conviction or sentence on the failure to appear charge. Therefore, the 7 days defendant spent in jail from August 15 until August 22, the date when he was sentenced on the original charges, do not fall within the statute. Credit should have been given for only the 6 days.

Heckman relies upon *State v. Von Busch*, 234 Neb. 119, 449 N.W.2d 237 (1989), claiming that the entire 13 days of jail time should be credited against his sentence. In *Von Busch, supra* at 120, 449 N.W.2d at 238, this court stated that "[w]hen a defendant is sentenced to an indefinite term up to the maximum prison term possible, credit must be given for *any* previously served jail time." (Emphasis supplied.) Despite the wording of this holding, a literal interpretation would clearly contravene the express language of § 83-1,106. The use of the term "any previously served jail time" refers to any jail time served on the charges for which sentences were imposed. The only exception for different offenses based on different conduct is found under § 83-1,106(4), which under the facts of this case would allow

the 6 days of credit to be applied to any sentence under the failure to appear charge if it was not previously credited under the initial three charges. Since the facts in this cause are to the contrary, subsection (4) does not apply.

To reach the result advocated by the defendant would in effect reward him for his actions in defying a court order. To the extent that *Von Busch, supra*, implies that "any" jail time means "all" jail time, it is overruled.

The purpose of jail time credit under § 83-1,106 "is to avoid the situation where one convicted of a crime is incarcerated for a period greater than the maximum term of years prescribed as punishment for the particular offense." *State v. Lynch*, 215 Neb. 528, 537, 340 N.W.2d 128, 134 (1983). As previously stated, the 7 days of incarceration were not a result of the particular offenses for which the defendant was actually sentenced.

In his second assignment of error, Heckman claims that the trial court erred when it ordered the defendant not to drive a motor vehicle for a period of 1 year from the date of his release from incarceration as it related to all three counts for which the defendant was sentenced. Heckman contends that this period should begin upon the expiration of his sentence for second-offense driving while under the influence of alcohol and should not be contingent upon any other imprisonment except as allowed by statute.

Applicable here is § 39-669.07(b), which provides in part:

> [T]he court shall, as part of the judgment of conviction [for second-offense drunk driving], order such person not to drive any motor vehicle for any purpose for a period of one year from the date ordered by the court and shall order that the operator's license of such person be revoked for a like period. . . . Such revocation shall not run concurrently with *any* jail term imposed.

(Emphasis supplied.)

Heckman claims that the language of the statute is ambiguous because it begs the question as to whether it applies only to the sentence imposed under the drunk driving conviction or whether it also applies to any other sentence imposed at the same time.

This court disagrees with Heckman's characterization of the statute. The statute is clear and unambiguous. The sentence "Such revocation shall not run concurrently with *any* jail term imposed" can have only one meaning. To reach the result advocated by Heckman would be absurd because, as with defendant's first assignment of error, it would reward a defendant for committing multiple criminal acts. Under the defendant's interpretation, a defendant who committed only second-offense drunk driving would suffer this additional penalty, whereas a defendant who committed an additional crime, and whose sentence for the second crime exceeded the 30-day and 1-year periods for the driving offense, would not have to suffer this additional penalty. That is because the 1-year suspension would expire before a defendant's release from incarceration. In construing a statute, it is presumed that the Legislature intended sensible, rather than absurd, results. *Houska v. City of Wahoo*, 235 Neb. 635, 456 N.W.2d 750 (1990). The only sensible result is that a penalty of suspending a motor vehicle operator's license be applied to individuals who have the ability to drive. It would be ludicrous to apply such a penalty to an individual while the individual is incarcerated. The trial court did not abuse its discretion in ordering the revocation of Heckman's driver's license to begin after his release from incarceration on all counts with which he was charged.

Consistent with this opinion, we modify Heckman's sentences so that he receives a total of 6 days' credit on his sentences for time spent in jail awaiting final disposition of his case. As modified, the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

DANIEL J. VENCIL, APPELLANT, V. VALMONT INDUSTRIES, INC., APPELLEE.

473 N.W.2d 409

Filed August 30, 1991. No. 90-1065.

1. **Workers' Compensation.** The compensability of a condition resulting from the cumulative effects of repeated work-related trauma is to be tested under the definition of accident contained in Neb. Rev. Stat. § 48-151(2) (Reissue 1988).
2. _____. The cumulative effects of repeated work-related trauma which do not at an identifiable moment produce objective symptoms requiring, within a reasonably limited period of time, medical attention and the interruption or discontinuance of employment are not the product of an accidental injury within the purview of Neb. Rev. Stat. § 48-151(2) (Reissue 1988).

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Richard L. Swenson for appellant.

Eric W. Kruger and William L. Switzer, Jr., of Rickerson, Welch & Kruger, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Plaintiff-appellant, Daniel J. Vencil, asserts, in summary, that the court below wrongly interpreted the applicable law and further erred in concluding that the evidence failed to establish he was entitled to workers' compensation benefits from his employer, defendant-appellee Valmont Industries, Inc. We affirm.

Vencil, having been born on March 9, 1961, is 30 years old. He graduated from high school on May 16, 1979, and began working for Valmont on August 27 of that year. He continued in this employment, his first and only full-time job, until July 31, 1989. Although he performed various duties, his work at all times required continuous bending, twisting, stooping, and the lifting and pushing of items weighing up to 200 pounds.

He began having low back pain in 1986 or 1987 which, over time, increased both in frequency and severity. He first consulted a physician in late 1988 or early 1989. By then, the pain was both intense and constant. On February 15, 1990,

after a course of conservative treatment, surgery was performed on his low back, and he began to experience some relief.

There is general agreement among the various examining and treating physicians, including the surgeon who performed the surgery, that although it cannot be said with reasonable medical certainty that Vencil's back condition was the direct result of his employment, his work activity contributed to and aggravated his condition. In the surgeon's view, although there was no specific instance of trauma or injury, the condition was consistent with the "kind of repetitive ongoing trauma that gradually caused deterioration of the fibers around the disk that then eventually allowed it to bulge out."

The disposition of Vencil's argument that his condition is compensable either as being the result of an accident or an occupational disease, or some hybrid of the two, is controlled by the recently decided *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 469 N.W.2d 542 (1991). We therein held that the compensability of a condition resulting from the cumulative effects of repeated work-related trauma is to be tested under the definition of accident contained in Neb. Rev. Stat. § 48-151(2) (Reissue 1988). That statute requires, among other things, that there be an injury which happens "suddenly and violently . . . producing at the time objective symptoms of an injury." The cumulative effects of repeated work-related trauma which do not at an identifiable moment produce objective symptoms requiring, within a reasonably limited period of time, medical attention and the interruption or discontinuance of employment are not the product of an accidental injury within the purview of § 48-151(2). *Maxson, supra.*

Vencil developed his symptoms over a period of not less than 7 years, and they required no interruption or discontinuance of his employment until almost 10 years had elapsed. Thus, the record fails to sustain either of Vencil's summarized assignments of error.

AFFIRMED.

SHANAHAN, J., dissenting.

To understand Vencil's case, and attempt to comprehend the majority's decision, one must start with the Nebraska Workers'

Compensation Act and the fact that Vencil asserted alternative bases for compensability of his claim: an injury caused by a work-related accident or an occupational disease.

Neb. Rev. Stat. § 48-101 (Reissue 1988) of the act provides:

> When personal injury is caused to an employee by accident or occupational disease, arising out of and in the course of his or her employment, such employee shall receive compensation therefor from his or her employer if the employee was not willfully negligent at the time of receiving such injury.

Thus, by virtue of § 48-101, compensability of a worker's claim may be alternatively based on a work-related accident or an occupational disease. In view of the alternative bases for compensability, the Nebraska Workers' Compensation Act, in Neb. Rev. Stat. § 48-151(2) (Reissue 1988), supplies the definition of "accident," namely, accident shall "mean an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." Consistent with § 48-101 and alternative compensability, § 48-151(3) states: "The term occupational disease shall mean only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment and shall exclude all ordinary diseases of life to which the general public is exposed."

Since § 48-151(3) offers a definition which includes the very thing to be defined, that is, "occupational disease shall mean only a disease," this court, in *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 212, 469 N.W.2d 542, 544 (1991), recognized the following definition for "disease": " '[A]n impairment of the normal state of the living animal . . . body or of any of its components that interrupts or modifies the performance of the vital functions, being a response to environmental factors [such as] industrial hazards . . . .' " The preceding definition substantially coincides with the standard medical definition of "disease," namely: "[A]ny deviation from or interruption of the normal structure or function of any part, organ, or system (or combination thereof) of the body that is manifested by a characteristic set of symptoms and signs and whose etiology,

pathology, and prognosis may be known or unknown." Dorland's Illustrated Medical Dictionary 385 (26th ed. 1981). Also, from a medical standpoint, an "occupational disease" is "due to factors involved in one's employment, e.g., various forms of pneumoconiosis or dermatitis." *Id.* at 392. "Trauma" means "a wound or injury, whether physical or psychic." *Id.* at 1388. Thus, an occupational disease is a condition which causes impairment, deviation, or interruption of the normal structure or function of a worker's body and which results from hazards or conditions peculiar to a particular occupation or employment.

Referring to "occupational disease" in § 48-151(3), this court noted in *Ritter v. Hawkeye-Security Ins. Co.*, 178 Neb. 792, 795, 135 N.W.2d 470, 472 (1965):

> The requirement of the statute is that the cause and conditions of the disease be characteristic of and peculiar to the employment and that the disease be other than an ordinary disease of life. The statute does not require that the disease be one which originates exclusively from the employment. The statute means that the conditions of the employment must result in a hazard which distinguishes it in character from employment generally.

As Professor Larson points out:

> [T]he two crucial points of distinction between accident and occupational disease were the element of unexpectedness and the matter of time-definiteness. What set occupational disease apart from accidental injuries was both the fact that they could not honestly be said to be unexpected, since they were recognized as inherent hazard of continued exposure to conditions of the particular employment, and the fact that they were gradual rather than sudden in onset.

1B A. Larson, The Law of Workmen's Compensation § 41.31 at 7-491 to 7-492 (1991).

In line with the foregoing characterization and observations regarding an occupational disease, this court has recognized compensability in the following occupational disease cases: *Osteen v. A. C. and S., Inc.*, 209 Neb. 282, 307 N.W.2d 514 (1981) (peritoneal mesothelioma, a rare form of abdominal

cancer caused by protracted exposure to asbestos particles); *Ritter v. Hawkeye-Security Ins. Co., supra* (a dishwasher's contact dermatitis caused by repeated exposure to solvents and cleaning agents); *Riggs v. Gooch Milling & Elevator Co.*, 173 Neb. 70, 112 N.W.2d 531 (1961) (millworker's inhaling wheat dust over an extended period resulted in emphysema, with secondary polycythemia, pneumoconiosis, and a decompensated heart); and *Hauff v. Kimball,* 163 Neb. 55, 77 N.W.2d 683 (1956) (granite cutter's contraction of pneumoconiosis silicosis, an inflammatory disease of the lungs due to silica dust inhaled during nearly 40 years' employment). In each of the foregoing cases, a worker sustained work-related bodily injury (trauma) and eventual disability or death from the accumulation of repeated trauma, although the injury was not dramatically and immediately discernible when any individualized trauma recurred to the body.

In Vencil's case the uncontradicted medical evidence definitely established the causal connection between Vencil's repeated lifting, bending, and twisting, which were present in an unusual degree in Vencil's employment at Valmont, and the back problem, which is the basis for Vencil's claim for compensation. Vencil, 28 years old when his disabling condition prevented his further working, had no back injury before his employment with Valmont. In light of Vencil's 10-year work history of repetitive activity which placed extraordinary stress on his back, the neurosurgeon who attended Vencil stated that "most degenerative lumbar disk problems that I see are caused by repetitive heavy lifting, bending, twisting at work and activities in the course of daily living. I expect that Mr. Vencil's job, which includes lots of bending and lifting, has contributed to his problem." According to the neurosurgeon, Vencil's "degenerative lumbar disk disease" was attributable to the "repetitive motion injury" which resulted from "frequent lifting" at Valmont. Another of Vencil's physicians, an orthopedic surgeon, testified that there was no specifically indicated trauma to Vencil, before or after Vencil commenced working for Valmont, but that the particular type of work had a "considerable effect" on Vencil, that is, "but for" the work activity at Valmont, Vencil would not have suffered the back

condition which is the basis for his compensation claim. The orthopedist likened Vencil's condition to carpal tunnel syndrome, "an appropriate comparison" in view of the repeated trauma and persistent stress on Vencil's back, and concluded that "if [Vencil] had not been involved in this heavy type of work, there's a good probability that he would not have developed the problems he did," since it was more probable than not that Vencil would not have developed the back condition in the absence of the work-related "repetitive ongoing trauma" to Vencil's back. In the orthopod's opinion, "[I]t's a lot less likely that [Vencil] would have developed [his back condition] in the foreseeable future if it hadn't been for his work."

At the rehearing in Vencil's case, the compensation court found that there was no accident to afford compensability inasmuch as Vencil failed to prove that his injury occurred at a definite time or resulted in objective symptoms at "an identifiable point." In sustaining the decision by the compensation court, the majority falls back on *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 469 N.W.2d 542 (1991), for the proposition "[C]ompensability of a condition resulting from the cumulative effects of repeated work-related trauma is to be tested under the definition of accident contained in Neb. Rev. Stat. § 48-151(2) (Reissue 1988)." (Syllabus of the court.) True, in *Maxson*, to which Judges Shanahan and Grant dissented, this court stated:

> While it is thus quite clear that a condition resulting from the cumulative effects of repeated work-related trauma has some characteristics of both an accidental injury and an occupational disease, this court has concluded that the compensability of such a condition is to be tested under the statutory definition of accident. *Crosby v. American Stores*, 207 Neb. 251, 298 N.W.2d 157 (1980).

Maxson, supra at 212, 469 N.W.2d at 544.

However, as the reader will readily discern, the *Maxson* rule for compensability of cumulative effects from repeated work-related trauma is not a quotation, that is, a verbatim excerpt, from *Crosby v. American Stores*, 207 Neb. 251, 298 N.W.2d 157 (1980), which involved a claim for compensation

based on carpal tunnel syndrome caused by work-related tasks—assembling boxes and stacking boxes filled with meat. At the one-judge hearing in the compensation court, the judge held that Crosby's carpal tunnel syndrome was an occupational disease and, therefore, compensable. In a de novo determination on rehearing, the compensation court found that Crosby "had suffered an 'accident and injury, as a result of' repeated trauma to her hands." 207 Neb. at 253, 298 N.W.2d at 159. American Stores appealed and contended that "the compensation court, on rehearing, erred in finding that [Crosby] suffered carpal tunnel syndrome as the result of an accident arising out of her employment" with American Stores. *Id.*

In *Crosby*, this court stated:

> Part of the difficulty in this case is that the plaintiff's injury has some of the characteristics of both an accidental injury and an occupational disease.
>
> The plaintiff's use of her hands to strike the pallets and boxes caused an injury which produced objective symptoms at the time. Each striking was a sudden and violent event. Although no one blow produced an injury severe enough to be compensable by itself, the cumulative effect of the repeated trauma resulted in an injury which produced disability. Most jurisdictions regard the time of accident as sufficiently definite if either the cause is reasonably limited in time or the result materializes at an identifiable point. 1B Larson, Workmen's Compensation Law § 39.00 (1980). The facts in this case satisfied both tests. The plaintiff's difficulty with her hands commenced immediately after she was transferred to stack and record. In that respect, this case may be distinguished from cases involving chronic conditions which develop over a period of many years where the injury cannot be traced to a particular job or activity of the workman.
>
> The plaintiff's injury involved in this case resembles an occupational disease in that it developed over a period of time in a manner in which many diseases develop. There is some evidence that the temperature conditions which prevail in a packing plant contribute to the development

> of the injury which is found among employees in packing plants. There is other evidence that the injury has many possible causes and may be considered to be an ordinary disease of life.
>
> We think the analysis made by the compensation court, on rehearing, was correct on the facts in this case. The judgment is, therefore, affirmed.

Crosby, supra at 254-55, 298 N.W.2d at 159.

Apparently, the digressive discussion about occupational disease, a nonissue in *Crosby*, decoyed Larson to view *Crosby* as Nebraska's acknowledgment that carpal tunnel syndrome may be an occupational disease, as reflected in Larson's statement in reference to *Crosby*:

> Claimant suffered from carpal tunnel syndrome, an occupational disease. The court held that claimant had suffered an accident and injury as a result of repeated trauma to her hands. An accident need not be a single traumatic event. The injury resembled an occupational disease in that it developed over a long period of time and was peculiar to claimant's type of occupation. Therefore, she was entitled to compensation under the theory of occupational disease.

1B A. Larson, *supra*, § 41.33(b) n.45 at 7-534.

Although the work-related carpal tunnel syndrome in *Crosby* was obviously compensable as an occupational disease, the *Crosby* court allowed compensability on the basis of an "accident" characterized in § 48-151(2). Therefore, since the *Crosby* court affirmed an award in which the only issue was whether the injury was caused by a work-related accident, *Crosby* can only be read as recognition that under the particular facts in *Crosby*, the compensation court correctly concluded that Crosby's injury resulted from an accident, and cannot realistically be read to preclude compensability based on the cumulative effect of repetitive work-related trauma characterized as an "occupational disease."

Therefore, the *Maxson* rule, that is, "[C]ompensability of a condition resulting from the cumulative effects of repeated work-related trauma is to be tested under the definition of accident contained in Neb. Rev. Stat. § 48-151(2) (Reissue

1988)," is an obvious misreading and unfortunately consequential misinterpretation of *Crosby* and is irreconcilable with the Nebraska Workers' Compensation Act. Consequently, while evidence may fail to substantiate Vencil's claim based on a work-related accident, the undisputed evidence establishes that Vencil's back problem is an occupational disease within the meaning of § 48-151(3).

Several courts, applying provisions of workers' compensation acts containing language similar to that in § 48-151(3), have determined that back conditions resulting from repetitive and cumulative work-related traumas such as exist in Vencil's case are occupational diseases. See, *Patterson v. Connor*, 19 Ohio App. 3d 304, 484 N.E.2d 240 (1984) (a nurse's herniated disk was an occupational disease, because the disease was peculiar to her employment); *Shelby Mut. Ins. Co. v. DILHR*, 109 Wis. 2d 655, 327 N.W.2d 178 (1982) (claimant's herniated disk and degenerative arthritis, resulting from a 24-year career of heavy lifting and shoveling, constituted an occupational disease); *Matter of Keefer v. Norton Co.*, 68 A.D.2d 961, 414 N.Y.S.2d 764 (1979) (a claimant who suffered a herniated disk as the result of repeatedly lifting belts which weighed between 20 and 90 pounds contracted an occupational disease); *Fruehauf Corp. v. Workmen's Comp. App. Bd.*, 68 Cal. 2d 569, 440 P.2d 236, 68 Cal. Rptr. 164 (1968) (an employee whose work involved heavy lifting, twisting, and bending which resulted in three protruded lumbar disks, suffered an occupational disease); *Matter of Ross v. Kollsman Instrument Corp.*, 24 A.D.2d 670, 261 N.Y.S.2d 186 (1965) (a claimant who worked the same job for 20 years, which required bending, lifting, and carrying various weights, suffered an occupational disease, not an accident). A multitude of other decisions recognizing compensability of an occupational disease resulting from repeated trauma are included in the extensive annotations in 1B A. Larson, The Law of Workmen's Compensation §§ 41.33(b) and 41.42 (1991).

In view of Vencil's age, it is somewhat disingenuous to portray Vencil as one in an aging labor force, worn down by years of work and about to be listed among those who "have shuffled off this mortal coil." More disappointing is the view

that rather than assessing payment from those responsible for work-related injury and loss, the judiciary should pass the bucks of cost to taxpayers for payment from public funds. While that may be an adroit political maneuver and, to some, even the politically correct course of action, the judiciary should not be such a passionate paramour of politics. The fact remains that the majority's constricted construction of the Nebraska Workers' Compensation Act concerning compensability of disability from repeated trauma will eventually squeeze "occupational disease" out of the act. Moreover, after judicial disuse and demolition of the definition of "occupational disease" in the Nebraska Workers' Compensation Act, saying that the Legislature now has the occasion to restructure the statutory definition of "occupational disease" is much like saying that the fire started by the O'Leary cow's kicking over the lantern presented Chicago with a wonderful opportunity for urban redevelopment.

Obviously, in Vencil's case, the issue is not compensability for protracted and gradual deterioration of the human body, occurring usually and naturally throughout a lifetime outside any occupation or employment. The basic question is whether Vencil's employment conditions at Valmont caused disability from an occupational disease. Vencil's plight, shared with a good many other workers, is an inability to point to an isolated or solitary traumatic event on a specific workday and, nonetheless, experiencing a gradual onset and eventually resulting disease generated by repeated trauma. Therefore, what this court again faces is the prevalent problem presented by a worker's body or limbs subjected to work-related trauma over many months and perhaps years counted in decades. However, if this court, viewing the Nebraska Workers' Compensation Act in a narrow range of vision, continues misconstruction of *Crosby* through adherence to the *Maxson* rule that compensability for cumulative effects of repetitive work-related trauma is determined solely by an "identifiable moment" within the definition of accident under § 48-151(2), and excludes repetitive work-related trauma as an occupational disease within § 48-151(3), then the accident test currently used

by this court is a symptom of occupational diseases in the judiciary: retinitis pigmentosa statutorum and decisional dyslexia. Presently, the only physician to cure those illnesses is the Legislature.

Nevertheless, this cause should have been remanded to the Workers' Compensation Court, since Vencil proved a prima facie case that he suffers an occupational disease caused by his employment at Valmont. Hence, the compensation court is clearly erroneous in its conclusion that Vencil failed to establish compensability for his claim.

GRANT, J., dissenting.

I respectfully dissent based on the reasons set out in my dissent in *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 469 N.W.2d 542 (1991). I further state that it appears to me that the holding in *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982), has not only been diluted in this case, but has been overruled. The positions of the dissents in *Sandel, supra*, and in *Hayes v. A.M. Cohron, Inc.*, 224 Neb. 579, 400 N.W.2d 244 (1987), seem to have overruled *Sandel, supra*, sub silentio. I would reverse.

CAPORALE, J., concurring.

It seems to me that my dissenting colleagues' criticisms of the majority opinion inflate the judicial role. The plaintiff herein seeks workers' compensation benefits because he is gradually wearing out. However, the Nebraska Workers' Compensation Act compensates only those personal injuries which result from "accident or occupational disease, arising out of and in the course of . . . employment." Neb. Rev. Stat. § 48-101 (Reissue 1988). The gradual wearing process falls neither within this jurisdiction's definition of accident or occupational disease, see *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 469 N.W.2d 542 (1991), nor, I submit, within any reasonable definition of those terms. Although some do so at a slower rate than others, we need no evidential record to tell us that all humans gradually wear out until the process produces death.

Admittedly, some occupations contribute to the wearing process more than do others. Thus, there may be a basis for compensating gradual work-caused wear under some system or

another. I suggest that the federal Social Security Act does precisely that. See 42 U.S.C. § 423 (1988). Nonetheless, there may be some who would argue that our compensation act should supplement any other existing system and be extended to cover gradual work-caused wear.

I submit, however, that such is a policy decision to be made by our Legislature after full study, debate, and understanding of the economics involved; it is not a burden to be forced upon the employers of this state by judicial fiat. See, Neb. Const. art. II, § 1 (divides powers of government into the legislative, executive, and judicial branches and, as a general matter, prohibits one branch from encroaching on duties and prerogatives of other branches); *State ex rel. Spire v. Conway*, 238 Neb. 766, 472 N.W.2d 403 (1991). See, also, *Nebraska P.P. Dist. v. City of York*, 212 Neb. 747, 326 N.W.2d 22 (1982) (function of Legislature to declare law by enactment of statutes); *Bowers v. Maire*, 179 Neb. 239, 137 N.W.2d 796 (1965) (court will not indulge in judicial legislation); *State v. Tatreau*, 176 Neb. 381, 126 N.W.2d 157 (1964) (duty of court to administer law as it exists).

BOSLAUGH, WHITE, and FAHRNBRUCH, JJ., join in this concurrence.

MARY CLINE, APPELLANT, V. COUNTY SEAT LOUNGE, INC., AND TOWER INSURANCE COMPANY, INC., APPELLEES.

473 N.W.2d 404

Filed August 30, 1991. No. 90-1140.

1. **Workers' Compensation: Appeal and Error.** Findings of fact by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
3. **Workers' Compensation: Appeal and Error.** In an appeal from the Workers' Compensation Court, every controverted fact must be resolved in favor of the

successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.

4. **Workers' Compensation.** As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given testimony.
5. _____. Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the Workers' Compensation Court.
6. _____. Vocational rehabilitation may be denied where the injured worker is able to perform work for which the worker has previous training and experience.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Randall L. Lippstreu and Robert M. Harris, of Harris & Lippstreu, for appellant.

Jill Gradwohl Schroeder, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

Plaintiff, Mary Cline, appeals from a decision of the Nebraska Workers' Compensation Court which awarded her temporary total disability benefits from September 21, 1986, through December 17, 1986, due to a cervical strain, and which assigned her a subsequent 15-percent loss in earning capacity. The court denied compensability for a low back injury which was also alleged to have arisen out of and in the course of plaintiff's employment and denied vocational rehabilitation benefits. We affirm.

The record shows the following: Larry and Mary Cline, husband and wife, opened the County Seat Lounge in Scottsbluff in 1978. The County Seat Lounge was a nightclub featuring noontime lunches and dancing in the evenings. The club seated approximately 425 people and employed 10 to 12 workers. Plaintiff and her husband were coowners and operators of the lounge. Plaintiff testified that her job duties included bookkeeping, doing payroll, ordering food, bartending, and assisting in managing employees. In 1985, defendant-appellee County Seat Lounge was incorporated.

Plaintiff and her husband were sole shareholders. Plaintiff was secretary and received a salary of $250 per week. Her husband was president, with a salary of $500 per week. The corporation paid workers' compensation premiums on behalf of all of its employees. At the time of the injury, defendant-appellee Tower Insurance Company, Inc. (Tower), was the workers' compensation insurance carrier for the lounge.

Plaintiff testified that on September 20, 1986, she suffered an injury on the job while lifting two cardboard boxes of empty beer bottles. She stated that while lifting the bottles, she heard someone call her name and turned her head quickly. She testified that she immediately felt a pain which shot from her neck down into her arm. She continued to work that evening, although she continued to experience pain. She also worked the days following the injury.

Plaintiff first sought treatment for her injury on September 25, 1986. She went to a chiropractor and complained of pain in her neck, in her right arm, and between her shoulder blades, and of numbness in her right hand. She did not complain of low back pain in her initial visit with the chiropractor. The chiropractor took x rays of plaintiff's upper and lower spine. An insurance form filled out by the chiropractor on October 29, 1986, stated that plaintiff alleged injury to "her neck, upper back and right arm." There was no mention of a low back injury in the report. A letter from the chiropractor addressed to plaintiff's counsel dated August 25, 1988, stated that in addition to the above-mentioned complaints, plaintiff, at the time of her first visit, had complained of "a left hip and low back pain which periodically radiated into the left leg."

Plaintiff testified that she saw the chiropractor three times a week for chiropractic treatments between her first visit and December 4, 1986. Treatment included "Chiropractic Manipulation, Trigger Point Therapy and Inter Segmental Traction." Plaintiff was given a shoulder brace that she wore 24 hours a day.

After December 4, 1986, plaintiff's treatments were discontinued. Plaintiff testified, over objection, that "[t]he insurance company said it . . . wouldn't pay for any more chiropractic treatment." No letter to that effect appears in the

record. In his August 25, 1988, letter to plaintiff's counsel, the chiropractor states that "Mrs. Cline discontinued treatment in this office due to a report issued by the Workmen's Compensation Carrier orthopedic consultant . . . ." The orthopedic surgeon first examined the patient in February 1987.

On December 17, 1986, the chiropractor filled out a "Medical Status Report" form for Tower. The report described the plaintiff's condition, as of her December 4, 1986, visit, as "intermittent tingling of the right arm and hand with nocturnal paresthesia and premature fatigue of the right arm with usage." The typed answer to the question "Anticipated date of maximum medical improvement or discharge" stated "approximtely [sic] 2-1-87." The chiropractor estimated 5 percent permanent partial disability to the "Cervical Thoracic Spine and Right Arm." The report contained no mention of any low back injury. Plaintiff testified that at the time of her December 4 visit with the chiropractor, her back "was feeling pretty good." Plaintiff did not seek or receive any medical treatment from December 1986 until December 1989.

On February 9, 1987, plaintiff was examined by defendants' orthopedic consultant. His recommendation was that the plaintiff give her injury more time and try some home therapy. He said, "At this point, I see no evidence of [a] 5% disability rating." Plaintiff testified that she did not mention anything about her lower back to the examining doctor because her back was not hurting at the time.

The evidence is sketchy concerning plaintiff's work history during 1987. There were no timesheets or tax records introduced into evidence. Plaintiff testified that although she generally stayed home, once in a while she would "feel guilty" and "would go in and try to help Larry." There is some evidence that plaintiff worked at the bar fairly regularly during the months of April and May. She testified that she discontinued going down to the bar after May because business was slow and she could not stand the pain of standing or sitting for too long. Plaintiff also continued to do the paperwork and recordkeeping at home for the business, until the business closed in August 1987 due to financial difficulties.

In May 1988, the Clines moved to California. They returned to Nebraska approximately 2 months later. For about 3 months after the Clines returned from California, plaintiff received unemployment compensation benefits from the State of Nebraska.

In the fall of 1988, plaintiff sold Avon cosmetics out of her home, but she soon discontinued this because she found it was not profitable. Plaintiff testified that she has not engaged in any other work, nor has she applied for any other jobs, since the County Seat Lounge closed in August 1987.

Plaintiff filed her petition in the Workers' Compensation Court on November 23, 1988. The chiropractor saw plaintiff on December 29, 1988, for evaluation purposes. His report of January 9, 1989, stated that it was his opinion that due to the interruption in plaintiff's care, her condition had deteriorated from an acute to a chronic condition. He recommended 50 to 70 chiropractic treatments over the next year at an estimated cost of $1,700 to $2,400. He found that impairment to the cervicothoracic spine and to the lumbar spine caused claimant to suffer a 15-percent whole body impairment.

In April 1989, plaintiff sought assistance from the Nebraska Division of Rehabilitation Services. A rehabilitation counselor with the division gave conflicting testimony as to plaintiff's employability. On direct examination, he stated that he found that plaintiff was not employable in any type of employment and that she was not a candidate for rehabilitation services. On cross-examination, he stated that based on the work restrictions contained in her medical reports, plaintiff had a number of transferable job skills and was qualified for a number of jobs for which she had prior training and experience. He also testified that one of the principal obstacles to plaintiff's returning to work was significant anxiety, frustration, and depression. He noted that he had forwarded a job lead to plaintiff that he felt she was qualified for, but that she took no action on it. A rehabilitation specialist hired by defendant testified that plaintiff was employable in a number of capacities and that several of her previous jobs fell within her capabilities.

On December 13, 1989, plaintiff was taken to a hospital emergency room after she experienced extreme pain. An

appointment was scheduled with a neurosurgeon for December 20. This doctor treated plaintiff through January 15, 1990, for pain and numbness in her neck, upper back, lower back, right hand and arm, and left leg. This was the first medical treatment plaintiff had sought or received in more than 3 years. This doctor's diagnosis was that plaintiff suffered from cervical strain syndrome, right carpal tunnel syndrome, and a disk lesion at L5-S1, all of which he believed were related to the September 1986 work accident.

Plaintiff then saw another neurosurgeon on a referral from the first. This doctor concluded that she suffered from carpal tunnel syndrome, a bulging disk at C5-6, and a degenerated disk at L5-S1, all of which required surgery. He concluded that plaintiff's condition resulted from the September 1986 work accident and that she would be considered totally disabled without corrective surgery.

On October 29, 1990, the compensation court rendered its award on rehearing. The court found that plaintiff experienced temporary total disability due to a cervical strain from September 21, 1986, through December 17, 1986, and a subsequent 15-percent loss in earning capacity. The court stated that plaintiff "failed to meet her burden of proof that the present conditions to the low back from which she suffers are the result of the original accident and injury of September 25, [sic] 1986." The court also denied vocational rehabilitation.

The court specifically found that the medical records of the chiropractor reflected that the original complaints given to him concerned the neck and shoulder areas, while the later complaints primarily concerned a low back injury. The court also specifically found that plaintiff was not entitled to vocational rehabilitation for the "reason that the plaintiff has had a demonstrated ability to return to work after the original injury and in fact did so return to work until unrelated financial difficulties closed the business."

Plaintiff assigns 11 errors in this appeal. As summarized, plaintiff contends that the compensation court erred (1) in failing to find plaintiff was entitled to compensation for her low back injury, (2) in finding that plaintiff was released for work in December 1986, (3) in denying any medical expenses after

December 1986, (4) in determining the degree of plaintiff's disability, and (5) in denying vocational rehabilitation benefits.

We first note this court's standard of review in workers' compensation cases. Findings of fact by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong. *Clobes v. Nebraska Boxed Beef*, 238 Neb. 612, 472 N.W.2d 893 (1991); *Knowlton v. Airport Transportation Co.*, 235 Neb. 96, 454 N.W.2d 278 (1990); Neb. Rev. Stat. § 48-185 (Reissue 1988). In testing the sufficiency of the evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Roan Eagle v. State*, 237 Neb. 961, 468 N.W.2d 382 (1991). Every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence. *S.N. Mart, Ltd. v. Maurices Inc.*, 234 Neb. 343, 451 N.W.2d 259 (1990). As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given testimony. *Roan Eagle, supra*.

Viewed in the light most favorable to the successful party, there is sufficient evidence to support the court's finding that the plaintiff has "failed to meet her burden of proof that the present conditions to the low back from which she suffers are the result of the original accident and injury of September 25, [sic] 1986." Neither of the reports filled out by the chiropractor in 1986 mentions the low back injury. Plaintiff did not testify at trial that she reported any such injury in her first visit with the chiropractor. She did testify that her low back was not troubling her at the time of her December 4, 1986, visit with the chiropractor. She also testified that her back was not troubling her at the time of her February 9, 1987, visit with defendants' examining physician. It was more than 3 years after plaintiff's treatments with the chiropractor that she again sought any treatment. Under these facts, the court's denial of compensation for the low back injury was not clearly wrong.

Plaintiff takes issue with the court's finding that the

chiropractor "treated the plaintiff through December 17, 1986, at which time he released plaintiff to return to work." The fact is that plaintiff worked during the entire time of her treatments with the chiropractor. It is true that he states that she would not reach maximum medical improvement until February 1, 1987, and that she would then have a 5-percent permanent partial disability. However, on February 9, 1987, the examining physician stated that he saw no necessity for further chiropractic treatments and stated that at that time he could find no evidence of permanent disability. The compensation court did not err in this regard.

Plaintiff next contends that the court erred in refusing to honor any medical expenses incurred after December 1986. Plaintiff did not seek any medical treatment until more than 3 years after that date. We cannot find that the evidence in the record is insufficient, as a matter of law, to support the compensation court's finding that plaintiff did not meet her burden of proving causation for medical expenses incurred after December 1986.

Plaintiff also takes issue with the degree of disability determined by the court. We have noted that the court found that the plaintiff failed to prove causation as to the low back injury and as to treatment sought years after the work-related accident. As late as January 1989, and even after allowing for the low back injury, the chiropractor rates the plaintiff's permanent disability at 15 percent. That was the percentage of disability determined by the compensation court. The court's determination is adequately supported by the record.

Finally, plaintiff disputes the court's denial of vocational rehabilitation. The court found that plaintiff continued to work at the County Seat Lounge after the accident. There was also testimony by both vocational rehabilitation specialists that plaintiff, in the condition she was in when seen by the specialists, could perform jobs for which she had previous training and experience. Whether an injured worker is entitled to vocational rehabilitation is ordinarily a question of fact to be determined by the Workers' Compensation Court. *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991). Vocational rehabilitation may be denied where the injured

worker is able to perform work for which the worker has previous training and experience. Neb. Rev. Stat. § 48-162.01(3) (Reissue 1988); *Yager, supra*; *Martinez v. Nebraska Dupaco*, 235 Neb. 720, 457 N.W.2d 285 (1990).

In passing, we note a problem which sometimes arises when medical evidence is submitted only on reports in the Workers' Compensation Court. Plaintiff's neurologist who first examined her in December 1989 said, in part, in his December 20, 1989, report: "It's possible she may have a glass eye and a wooden leg so far as the upper extremtiy [sic] is concerned." This phrase may convey information to another doctor, or to the esoteric few, but to a trier of fact, it is meaningless. If such phrases are to be used, counsel might well furnish a translation to the fact finder or the reviewing court.

The court did not err in any of the respects alleged by plaintiff. The award of the Nebraska Workers' Compensation Court on rehearing is affirmed.

AFFIRMED.

WHITE, J., concurring.

I write to express my disapproval of the language used in the compensation court's decision, to wit, plaintiff "failed to meet her burden of proof . . . ." The phrase is obviously meant to convey that the court chose to believe one set of facts rather than another. The use of the phrase raises implicitly the possibility that the court determined that plaintiff did not produce sufficient evidence to sustain a decision if one had been found for her.

If the court has decided an issue of fact or has found the proof insufficient as a matter of law, it would be helpful if it said what was the basis of its decision, instead of leaving the reviewing court to speculate.

STATE OF NEBRASKA EX REL. DONALD W. PEDERSON ET AL., APPELLEES, V. SAM J. HOWELL, TREASURER OF DOUGLAS COUNTY, NEBRASKA, APPELLEE, JAMES GOODBOUT ET AL., APPELLANTS.

474 N.W.2d 22

Filed September 6, 1991. No. 89-046.

1. **Courts: Judgments: Judicial Notice.** Where cases are interwoven and interdependent, and the controversy has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action.
2. **Sanitary and Improvement Districts: Uniform Commercial Code: Warrants: Words and Phrases.** Sanitary improvement warrants are investment securities under article 8 of the Uniform Commercial Code in the form of short-term interest-bearing orders payable on a specified date. They are issued by the board of trustees or administrator of a sanitary and improvement district to be paid from funds expected to be received in the future, including, but not limited to, property tax collections, special assessment collections, and proceeds of sale of general obligation bonds. Neb. Rev. Stat. § 31-727(5)(d) (Reissue 1984).
3. **Mandamus: Words and Phrases.** Mandamus is defined as an extraordinary remedy, not a writ of right, issued to compel the performance of a purely ministerial act or duty, imposed by law upon an inferior tribunal, corporation, board, or person, where (1) the relator has a clear legal right to the relief sought, (2) there is a corresponding clear duty existing on the part of the respondent to do the act in question, and (3) there is no other plain and adequate remedy available in the ordinary course of law.
4. **Actions: Abatement.** The main purpose of abating a civil action is to prevent unnecessary or vexatious litigation, the theory of our civil procedure being to avoid a multiplicity of suits.
5. **Actions: Plea in Abatement.** A plea in abatement does not go to the merits of an action, but, by presentation of facts extrinsic to the merits of an action, demonstrates irregularities or circumstances which preclude further prosecution of the action or require suspension of the proceedings.
6. _____: _____. A defendant may file a plea in abatement when there is another action pending between the same parties, involving the same or substantially the same subject matter, cause of action, and relief.
7. **Judgments: Plea in Abatement: Res Judicata.** As a general rule, where a judgment in a prior suit would be a bar to a judgment in a second suit brought in the same or another court of concurrent jurisdiction, the plea in abatement should be sustained.
8. **Mandamus.** Where the issuance of a writ of mandamus would disturb official action or create disorder or confusion, it may be denied, and this is so even when the petitioner has a clear legal right for which mandamus would be an appropriate remedy.
9. _____. To warrant the issuance of a writ of mandamus against an officer to

compel the officer to act, the duty to act must (1) be imposed on the officer by law, (2) still exist at the time the writ is applied for, and (3) be clear.

Appeal from the District Court for Douglas County: DARVID D. QUIST, Judge. Reversed and remanded for further proceedings.

Steven J. Riekes, of Richards, Riekes, Brown & Zabin, P.C., for appellants.

Brian J. Muench, of Thompson, Crounse, Pieper and Brumbaugh, P.C., and Dennis E. Martin, of Martin & Martin, for appellees Pederson and Westendorfs.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

FAHRNBRUCH, J.

The trustees of Sanitary and Improvement District No. 272 of Douglas County (S.I.D.) appeal a trial court's (1) overruling of their demurrer, (2) refusal to abate or continue these proceedings until prior pending litigation had been finally determined, and (3) order for issuance of a writ of mandamus requiring the appellants to pay approximately $104,000 plus interest to certain S.I.D. warrant holders.

Because the district court for Douglas County erred in overruling the trustees' demurrer and in refusing to abate these proceedings or to continue them until prior pending litigation had been finally determined, and because a writ of mandamus was prematurely ordered, we reverse the decision and remand this cause to the trial court for further proceedings not inconsistent with this opinion.

At the time of the filing of relator appellees' petition in the district court, the respondents James Goodbout, Rick Cushing, Lori Van Fleet, Patrick J. Burns, and John M. Murphy were the trustees of S.I.D. During the course of the proceedings, Kathleen Sullivan, Greg Jung, and Kurt Wolfert became members of the S.I.D. board of trustees and replaced Cushing, Van Fleet, and Murphy as respondents in this action.

This is the second appeal to this court regarding the construction of an in-ground green space irrigation system installed in three parks within S.I.D., also known as the Willow

Wood subdivision, in Douglas County, Nebraska. The first action is reported at *S.I.D. No. 272 v. Marquardt*, 233 Neb. 39, 443 N.W.2d 877 (1989) (*S.I.D. I*). This court takes judicial notice of that case. See *First Nat. Bank v. Chadron Energy Corp.*, 236 Neb. 199, 459 N.W.2d 736 (1990) (where cases are interwoven and interdependent, and the controversy has already been considered and determined in a prior proceeding involving one of the parties now before the court, the court has a right to examine its own records and take judicial notice of its own proceedings and judgment in the prior action).

Trial was held in this second action (*S.I.D. II*) on the basis of stipulations and exhibits, including depositions. Those stipulations and exhibits reflect that in late 1983, M & A Special Mowing submitted a bid and subsequently received a 2-year contract to water three parks in Willow Wood. According to Francis Sullivan, the former chairman of the S.I.D. board of trustees, he received, free of charge, bushes and approximately $1,200 in lumber for a deck at his home in exchange for informing M & A of a competitor's bid in regard to the watering contract.

In January 1984, M & A proposed an underground sprinkler system to water the Willow Wood parks. The watering had previously been done through hoses and sprinkler heads that were attached to fire hydrants and moved around. According to one contractor, the cost of the sprinkler system was so much lower than the cost of the watering contract that the contractors were able to further mark up the sprinkler system price in exchange for losing the watering contract. Sullivan testified he was to receive $5,000 to help push the proposal through the S.I.D. board. Sullivan did, in fact, receive yard lighting, a trip to Houston, and $400 to $500 in cash. The board accepted the proposal on March 22, 1984. According to Sullivan, another trustee received, free of charge, an underground sprinkler system for his home for remaining silent and approving a later addendum to the contract on September 5, 1984, which was recorded in the board's minutes of March 25, 1985.

Capital improvements to public parks within a sanitary and improvement district require the approval of the municipality or county which has zoning jurisdiction. Neb. Rev. Stat.

§ 31-740 (Reissue 1984). Additional statutory requirements include notice and public bidding, formal resolution and acceptance of the work, plans, specifications, a certificate of acceptance, and a statement of costs made and filed by the district's engineer. See, Neb. Rev. Stat. §§ 31-741, 31-744, 31-745, 31-747, 31-748, 31-749, and 31-755 (Reissue 1988). In 1982, approval of a similar underground sprinkler system had been denied S.I.D. by the city of Omaha. In order to avoid the requirement of obtaining city approval of the current underground sprinkler system, the proposal was termed a "watering contract" and was to be paid over a 2-year period, similarly to the payments on the original watering contract. By this means, the then S.I.D. board of trustees circumvented the statutory requirements for capital improvements. It was Sullivan's opinion and that of the installing contractor that S.I.D. overpaid for the sprinkler system. Sullivan testified the price was inflated by the inclusion of bribes in the contract price and the avoidance of public bidding. The installing contractor said he could have installed the system more cheaply. The total contract price was $171,833.10. There is evidence that the total contract price should have not exceeded approximately $117,118. There is other evidence that the grass within the parks is a drought-resistant type which does not require any water other than that which occurs by natural rainfall in eastern Nebraska, and that at the time of trial, May 24, 1988, the installed sprinkler system had not been used since the fall of 1985.

To pay for this sprinkler system, warrants were issued to M & A. Warrants are investment securities under article 8 of the Uniform Commercial Code in the form of short-term interest-bearing orders payable on a specified date. They are issued by the board of trustees or administrator of a sanitary and improvement district to be paid from funds expected to be received in the future, including, but not limited to, property tax collections, special assessment collections, and proceeds of sale of general obligation bonds. Neb. Rev. Stat. § 31-727(5)(d) (Reissue 1984). These warrants were sold by the contractor to PaineWebber, Inc., a financial consulting firm, which resold them to various holders, including the relator appellees.

On October 21, 1986, after details of the sprinkler system transactions came to light, S.I.D., through a board of trustees consisting of at least one new member, filed a petition for declaratory judgment (see *S.I.D. I*) in the district court for Douglas County. Named as defendants were several purported contractors, the former S.I.D. trustees, and 21 warrant holders, which included two "Doe" defendants. S.I.D. claimed that the sprinkler contracts were illegal and asked that the Douglas County treasurer, as ex officio treasurer of S.I.D., be enjoined from paying the challenged warrants and that the warrants be declared void. S.I.D.'s new board of trustees had ordered the treasurer not to pay the challenged warrants. On July 31, 1987, the district court sustained general and special demurrers filed by 15 of the warrant holders, including the 3 named warrant holders in *S.I.D. II*. In *S.I.D. I*, the trial court found that S.I.D.'s petition failed to state a cause of action against the warrant holders and that it contained a misjoinder of parties and causes of action. The S.I.D. appealed these rulings to this court.

While waiting for a decision from this court in the appeal of *S.I.D. I*, some of the warrant holders, on August 25, 1987, filed in the district court for Douglas County this action (*S.I.D. II*) for a writ of mandamus. All of the plaintiff warrant holders in *S.I.D. II* were defendants in *S.I.D. I* who had had their demurrers sustained at the trial level.

In this mandamus action, the warrant holders sought (1) to compel the new S.I.D. board members to call the warrants and to withdraw the resolution ordering the treasurer not to pay the warrants, and (2) to compel the treasurer to pay the warrants in accordance with Neb. Rev. Stat. §§ 77-2201 et seq. (Reissues 1986 & 1990). The S.I.D. trustees filed a demurrer, stating, in essence, that (1) another action was pending on the same cause, (2) the facts alleged were insufficient to state a cause of action, and (3) the trial court had no jurisdiction. The demurrer was overruled.

On January 19, 1988, the S.I.D. board passed a resolution reaffirming two earlier orders of the board directing the treasurer not to pay the challenged warrants, but, rather, to escrow the funds because of the pending litigation. Prior to trial

in *S.I.D. II*, the S.I.D. trustees filed a motion to abate or continue the present action until the proceedings in *S.I.D. I* were resolved. This motion was also overruled. On May 24, 1988, trial was had in *S.I.D. II*. On December 28, 1988, the district court, without reciting any specific findings of fact, granted the writ of mandamus requested by the warrant holders. The S.I.D. trustees timely appealed to this court.

Mandamus is defined as an extraordinary remedy, not a writ of right, *State ex rel. Thompson v. Alderman*, 230 Neb. 335, 431 N.W.2d 625 (1988), issued to compel the performance of a purely ministerial act or duty, *State ex rel. Freezer Servs., Inc. v. Mullen*, 235 Neb. 981, 458 N.W.2d 245 (1990), imposed by law upon an inferior tribunal, corporation, board, or person, see Neb. Rev. Stat. § 25-2156 (Reissue 1989), where (1) the relator has a clear legal right to the relief sought; (2) there is a corresponding clear duty existing on the part of the respondent to do the act in question, *State ex rel. Mercurio v. Board of Regents*, 213 Neb. 251, 329 N.W.2d 87 (1983), *cert. denied* 463 U.S. 1214, 103 S. Ct. 3554, 77 L. Ed. 2d 1400; and (3) there is no other plain and adequate remedy available in the ordinary course of law, *State ex rel. PROUD v. Conley*, 236 Neb. 122, 459 N.W.2d 222 (1990).

In regard to the first assignment of error, that the trustees' demurrer was overruled, Neb. Rev. Stat. § 25-806 (Reissue 1989) provides: "The defendant may demur to the petition only when it appears on its face . . . (3) that there is another action pending between the same parties for the same cause . . . or (6) that the petition does not state facts sufficient to constitute a cause of action."

The face of the petition clearly reflects that *S.I.D. I* was pending at the time the petition in *S.I.D. II* was filed. Further, there is nothing in the *S.I.D. II* petition from which it can be inferred that the warrant holders gave value for the warrants. Without such an allegation in the petition, the petition fails to allege facts sufficient to state a cause of action, nor does it allege sufficient facts to claim a clear duty on the part of the treasurer to pay the warrants. See *S.I.D. I* for requirement that the warrants must be obtained for value for warrant holders to be bona fide purchasers. The trial court erred in failing to sustain

the appellant trustees' demurrer, which the trustees preserved in their answer.

Application of legal and equitable principles as they relate to the issuance of a writ of mandamus also requires that the trial court be reversed.

While a writ of mandamus may be utilized to enforce payment of warrants issued by a governmental body, see *State, ex rel. Warren, v. Raabe*, 140 Neb. 16, 299 N.W. 338 (1941), the facts in this case reflect (1) that in the interest of equity and judicial economy a writ of mandamus was prematurely ordered in this case and (2) that the trial court erred in failing to abate or continue *S.I.D. II* until a final determination had been made in *S.I.D. I*.

Appellants' second assignment of error, that the trial court erred in denying their motion to abate or continue the proceedings in *S.I.D. II* until *S.I.D. I*, which was pending in the Supreme Court, had been finally determined, also has merit. As stated, relator appellees' *S.I.D. II* petition alleged that *S.I.D. I* was pending in the Supreme Court when appellees filed *S.I.D. II*, and S.I.D.'s trustees properly pleaded their plea in abatement and motion to continue. The main purpose of abating a civil action is to prevent unnecessary or vexatious litigation, the theory of our civil procedure being to avoid a multiplicity of suits. See *Farmers State Bank v. Germer*, 231 Neb. 572, 437 N.W.2d 463 (1989).

"A plea in abatement does not go to the merits of an action, but, by presentation of facts extrinsic to the merits of an action, demonstrates irregularities or circumstances which preclude further prosecution of the action or require suspension of the proceedings." *Williams v. Gould, Inc.*, 232 Neb. 862, 872, 443 N.W.2d 577, 584 (1989). A defendant may file a plea in abatement when there is another action pending between the same parties, involving the same or substantially the same subject matter, cause of action, and relief. *Kash v. McDermott & Miller*, 221 Neb. 297, 376 N.W.2d 558 (1985). See, also, *Miller v. Miller*, 213 Neb. 219, 328 N.W.2d 210 (1982); *National Bank of Commerce T. & S. Assn. v. Shull*, 195 Neb. 590, 239 N.W.2d 505 (1976). As a general rule, where a judgment in a prior suit would be a bar to a judgment in the second suit brought in the

same or another court of concurrent jurisdiction, the plea in abatement should be sustained. *Germer, supra*; *Shull, supra*. See, also, *Jourdon v. Commonwealth Co.*, 169 Neb. 482, 100 N.W.2d 84 (1959); *State, ex rel. C., B. & Q. R. Co., v. N. Lincoln St. Ry. Co.*, 34 Neb. 634, 52 N.W. 369 (1892) (the plea of the pendency of another suit in bar is applicable to proceedings in mandamus). Granting the appellants' motion for a continuance of the proceedings in *S.I.D. II* until *S.I.D. I* was finally decided would have served the same purpose as a plea in abatement. Since a declaratory judgment adverse to the warrant holders in *S.I.D. I* would bar the writ of mandamus in *S.I.D. II*, the trial court erred in failing to sustain appellants' plea in abatement and motion for continuance.

This court has also recognized the equitable principle that where the issuance of a writ of mandamus would disturb official action *or create disorder or confusion*, it may be denied, and this is so even when the petitioner has a clear legal right for which mandamus would be an appropriate remedy. *State ex rel. Goetz v. Lundak*, 199 Neb. 585, 260 N.W.2d 589 (1977). At the time the writ of mandamus was ordered in *S.I.D. II*, it was clear that the issuance of a writ of mandamus under the posture of this case and *S.I.D. I* could create disorder or confusion, particularly if this court, in *S.I.D. I*, should set aside the trial court's ruling in *S.I.D. I* and remand *S.I.D. I* to the trial court for determination of the validity of the warrants, which is precisely what this court in fact did. See *S.I.D. I*. The underlying issue in both *S.I.D. I* and *S.I.D. II* is whether the outstanding warrants are valid in the hands of the warrant holders. Permitting the same cause of action to be adjudicated in two separate cases at the same time obviously can only result in disorder and confusion in a judicial system.

To warrant the issuance of a writ of mandamus against an officer to compel the officer to act, the duty to act must (1) be imposed on the officer by law, (2) still exist at the time the writ is applied for, and (3) be clear. *State ex rel. PROUD v. Conley*, 236 Neb. 122, 459 N.W.2d 222 (1990). In the context of *S.I.D. I* and *S.I.D. II*, in order for the duty to act to be clear and for mandamus to become a proper remedy for the warrant holders, a final judicial determination must be made that the warrants in

the hands of the plaintiffs are valid. At the time the warrant holders filed *S.I.D. II*, a final judicial determination had not been made as to the validity of the warrants in question, nor had it been judicially determined that the trustees and the treasurer had a clear duty to act.

In their argument relative to their final assignment of error the appellants ask this court to determine whether the warrants are valid. Despite the apparent need for such a determination, this action is not appropriate for that purpose. Having concluded that the issuance of the writ of mandamus in *S.I.D. II* should not have been ordered, we need go no further. Resolution of the validity of the warrants is a proper subject of the declaratory judgment proceeding (*S.I.D. I*), not this mandamus proceeding.

From the foregoing analysis, we conclude that the issuance of a writ of mandamus in this action was premature, and that the district court erred in failing to sustain the demurrer of the S.I.D. trustees and in denying the appellants' motion to abate or to continue these proceedings until prior pending litigation, *S.I.D. I*, had been finally determined.

The judgment of the district court is reversed, and this cause is remanded to that court for further proceedings not inconsistent with this opinion. In the interest of judicial economy and to prevent disorder and confusion, the district court for Douglas County is ordered to consolidate *S.I.D. I* with *S.I.D. II* for trial.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

RONALD J. ALBEE, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF BOB RAY ALBEE, DECEASED, ET AL., APPELLEES AND CROSS-APPELLANTS, V. MAVERICK MEDIA, INC., APPELLANT AND CROSS-APPELLEE.

474 N.W.2d 238

Filed September 6, 1991. No. 89-321.

Contracts: Actions. As a general rule, a demand for performance is unnecessary for a suit to enforce an agreement unless such demand is required by the terms of the contract or the peculiar nature of the transaction.

Appeal from the District Court for Otoe County: RAYMOND J. CASE, Judge. Affirmed in part, and in part reversed and modified.

Donald R. Witt and Gail S. Perry, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

L. W. Kelly, of Kelly, Kelly & Schroeder, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

Ronald J. Albee, personal representative of the estate of Bob Ray Albee, deceased, and the heirs of Bob Ray Albee, all the preceding collectively designated as "Albees," brought a breach of contract action based on a stock purchase agreement against Maverick Media, Inc. After a bench trial, the district court found that Maverick owed Albees $50,000 pursuant to the agreement, but awarded Maverick a setoff of $17,661.39. Maverick appealed, and Albees cross-appealed. We affirm the district court's judgment in part and reverse and modify in part.

STANDARD OF REVIEW

> In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. . . . In reviewing a judgment awarded in a bench trial of a law action, the Supreme Court does not reweigh evidence but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the

> successful party, who is entitled to every reasonable inference deducible from the evidence.

Oddo v. Speedway Scaffold Co., 233 Neb. 1, 2, 443 N.W.2d 596, 598-99 (1989). Accord, *Citizens Fidelity Bank v. Southwest Bank*, 238 Neb. 677, 472 N.W.2d 198 (1991); *Wibbels v. Unick*, 229 Neb. 184, 426 N.W.2d 244 (1988); *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

> In a bench trial of a law action, the court, as the "trier of fact," is the sole judge of the credibility of witnesses and the weight to be given their testimony. Among the factors entering into the trial court's resolution of any conflicts of evidence are such items as the respective interests of the parties in the litigation; the demeanor of witnesses, including the parties, while testifying before the court; the apparent fairness exhibited by witnesses; the extent to which testimony of various witnesses is corroborated; and the reasonableness or unreasonableness of testimony from the witnesses.

Lynn v. Metropolitan Utilities Dist., 225 Neb. 121, 125, 403 N.W.2d 335, 338 (1987). Accord, *Citizens Fidelity Bank v. Southwest Bank, supra*; *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985).

"Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review." *Huffman v. Huffman*, 232 Neb. 742, 748, 441 N.W.2d 899, 904 (1989). Accord, *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989); *In re Estate of Walker*, 224 Neb. 812, 402 N.W.2d 251 (1987); *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).

THE STOCK PURCHASE AGREEMENT

On November 29, 1983, Albees and Maverick entered into a purchase agreement whereby Maverick purchased all shares of common stock in Albee Printing Co., Inc., and its property, including specified accounts receivable, for the purchase price of $150,000. Maverick promised to pay $50,000 at closing on November 29, 1983, with the remaining $100,000 payable in 10

equal and semiannual installments of $10,000, commencing 6 months after closing. The shares of stock were placed in escrow at Five Points Bank pending payments by Maverick.

Under the heading "WARRANTIES AND REPRESENTATIONS OF SELLERS," paragraph 4.1 states:

> Sellers, individually and collectively, warrant and represent to Buyer as follows:
>
> . . . .
>
> (p) A schedule of all of the accounts receivable of Albee which are collectible in the ordinary course of business with the exceptions noted therein is attached hereto as Schedule 6 and Sellers agree to update any changes in the accounts receivable up to the date of closing.

Paragraph 6.2(a) of the agreement provides: "Sellers' representations and warranties shall be true on and as of the closing date with the same force and effect as if again made thereon." Paragraph 8.3, in relevant parts, provides:

> (b) In the event of any breach on the part of Sellers, Buyer may offset any damages relating therefrom with a direct credit against payments due and to become due the Sellers pursuant to this Agreement.
>
> (c) In the event of any litigation with respect to this Agreement the prevailing party shall be entitled to recover, in addition to all other relief to which such party may be entitled, its costs, expenses and attorney fees incurred in connection with said litigation.
>
> (d) Sellers hereby agree to indemnify and hold harmless Buyer and Buyer hereby agrees to indemnify and hold harmless Sellers from and against any and all claims, liabilities, losses and other damages, including all costs, expenses and fees arising out of the breach of any representation, warranty or covenant contained herein by the party against whom indemnification is sought or arising out of the actual failure of Sellers to fully perform, satisfy and pay all of Sellers' obligations and liabilities hereunder. Buyer especially agrees to indemnify and hold harmless the Sellers from any and all claims, liabilities and losses arising out of the Seller's [sic] personal guarantees with respect to the small business loans at five points [sic]

Bank of Grand Island.

. . . .

(f) All of the representations, warranties and covenants made by the parties herein or in any written statements, certificates, schedules or exhibits hereto or any other document delivered by them pursuant hereto in connection with the transactions contemplated hereby shall survive the closing date and shall be binding on the parties notwithstanding any investigations made by them.

PERFORMANCE OF THE AGREEMENT

By August 22, 1986, Maverick had paid Albees $118,399.47, which included principal of $100,000 and interest on the purchase price. The Albees allowed Maverick a $2,156 setoff against principal and interest due, based on Albees' breach of warranty and failure to transfer title for a 1978 Ford van involved in the sale. The balance of the purchase price was $50,000 on August 22, 1986.

NOTICE OF SETOFF

In its letter of October 31, 1986, to William Marshall at Five Points Bank, the escrow agent, Maverick stated:

Mr. Marshall:

As escrow agent for Maverick Media, Inc. and the Albee heirs in the sale of Albee Printing Co., Inc. to Maverick Media, Inc., would you please relay the following information to each of the heirs?

As provided in Paragraph 8.3 (b) of the purchase agreement, damages from any breach of the contract by the sellers may be offset by the buyer as a direct credit against payments due to the sellers.

Pursuant to Paragraph 4.1 (p) of the agreement, the sellers provided a schedule of accounts receivable which the sellers warranted to be collectible in the ordinary course of business. Despite all of the best efforts of the buyer, a large amount of the accounts receivable have proved to be uncollectible. We retained law firms to aid us in efforts to collect these accounts, and have been informed that any further legal efforts would be a waste.

I am enclosing a schedule of all accounts that have

proven to be uncollectible. The total is $47,580.03. The total amount due to the heirs, according to the purchase agreement, is $50,000.00. Therefore, on November 29, 1986, the date of the next payment due, Maverick Media, Inc. will issue a check to Five Points Bank, as escrow agent, in the amount of $2,419.97. We do not feel any additional interest is due, since we have already paid considerable interest on the offset amount. Also, you will note that we have not included legal fees and expenses we incurred in our collection efforts.

The buyer's obligations under the agreement will then be fully discharged, and Maverick Media, Inc. will expect to receive from you all remaining shares of stock in Albee Printing Co., Inc., now held by Five Points Bank in escrow.

Upon receipt of the stock certificates, Maverick Media, Inc. will regard the agreement as fully performed by all parties. However, Maverick Media, Inc. reserves the right to assert any rights and claims it may have under the agreement, including additional damages not claimed herein, in the event the stock is not promptly delivered pursuant to the terms hereof or in the event any claim is asserted by the sellers against Maverick Media, Inc.

Marshall informed Albees about Maverick's proposed setoff of $47,580.03, but Albees rejected the claimed setoff. When Maverick tendered $2,419.97 on November 29, 1986, Marshall declined to deliver the remaining common stock held in escrow, but retained the tendered payment of $2,419.97.

Albees then sued Maverick for $50,000. Maverick countered that Albees warranted the accounts receivable to be collectible in the ordinary course of business and that since certain accounts were not collectible, Maverick was entitled to a setoff. Albees responded that there was no warranty concerning collectibility of the accounts and that even if there were such a warranty, Maverick was not allowed a setoff for the uncollected accounts, because Maverick had failed to notify Albees regarding the breach of warranty, that is, noncollectibility of the accounts.

TRIAL AND DECISION

One of the Albees testified that her understanding of the "warranty" provision in paragraph 4.1(p) of the agreement was simply an "accurate accounting" of the accounts receivable. Often with assistance from some of the Albees, Maverick mailed bills and telephoned those listed in the accounts receivable in efforts to collect payment on the accounts. Also, Maverick hired I.C. Systems, Inc., a collection agency, and employed several law firms to assist in Maverick's efforts to collect the accounts receivable. Maverick paid $1,252.19 for those collection efforts and even resorted to litigation to collect accounts, including the account of Platte Valley Shopper, one of the itemized accounts receivable.

Regarding the Platte Valley Shopper account, Maverick's lawyers sent Platte Valley Shopper a demand letter for $29,918.64 on December 8, 1983. After Platte Valley Shopper failed to pay, Maverick's attorney filed an action to collect the account. Maverick and Platte Valley Shopper later settled the case through a compromise of $2,000 cash paid by Platte Valley Shopper and a transfer of business equipment, valued at $300, to Maverick. Albees were unaware of Maverick's actions or settlement of the Platte Valley Shopper account. According to the list of accounts receivable existing at execution of the Albee-Maverick agreement, there was a total of $47,580.03 due on the accounts receivable, including $29,918.64 on the Platte Valley Shopper account.

The district court concluded that Albees had

> warranted by terms of the contract that all accounts receivable were collectable in the ordinary course of business and that [Maverick] is entitled to a setoff for the accounts receivable which are uncollected and uncollectable in the ordinary course of business with the exceptions hereafter set out.
>
> One of the accounts on which [Maverick] seeks a setoff is identified as Platte Valley Shopper, Scottsbluff, in the sum of $29,918.64, this being the same amount as expressed in Exhibit No. 9 at the time of the execution of the contract. [Maverick] attempted to collect the Platte Valley Shopper account by litigation, and in the course of

> litigation compromised the debt for the sum of $2,000 cash (Exhibit No. 29) and equipment valued at $300.00 without notice to [Albees]; that as a matter of law, [Maverick] cannot by this act of compromise without notice place [Albees] in a worse position than they would have been had [Maverick] claimed setoff prior to the compromise. See General Electric v. Lewis, 230 Neb. 429, UCC 9-504(3) (Reissue 1980) . . . .

Hence, the district court found that Maverick owed Albees $50,000 pursuant to the agreement; as a matter of law disallowed $29,918.64 as a setoff for the Platte Valley Shopper account, but awarded Maverick a setoff of $17,661.39, which was the balance of the accounts receivable after the disallowance for the Platte Valley Shopper account; denied both parties' requests for prejudgment interest; and ordered Maverick to pay the costs of the action.

ASSIGNMENTS OF ERROR

Maverick asserts that the district court erred by denying Maverick a setoff of $29,918.64 for the Platte Valley Shopper account which was settled but uncollectible, by denying Maverick prejudgment interest from the date of the sale, and by denying Maverick a credit for the cost of attempting to collect the accounts receivable.

DISCUSSION

Notification Requirements Under the U.C.C.

For its decision, the district court had to use Neb. U.C.C. § 9-102 (Reissue 1980), which provides:

> (1) . . . [T]his article applies (a) to any transaction (regardless of its form) which is intended to create a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, or accounts; and also (b) to any sale of accounts or chattel paper.
>
> (2) This article applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor's lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security,

to reach a conclusion based on Neb. U.C.C. § 9-504(3) (Reissue 1980), which permits a secured party's disposition of collateral after a debtor's default and which provides: "[R]easonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor . . . ."

In the Albee-Maverick sale, accounts receivable were an asset purchased, not security for a debt. Thus, article 9 of the Uniform Commercial Code and, more particularly, the notice requirement of § 9-504(3) do not apply to this case.

As a general rule, a demand for performance is unnecessary for a suit to enforce an agreement unless such demand is required by the terms of the contract or the peculiar nature of the transaction. See *Peckham v. Deans*, 186 Neb. 190, 181 N.W.2d 851 (1970). In *Fink v. Denbeck*, 206 Neb. 462, 465-66, 293 N.W.2d 398, 401 (1980), this court stated:

> The general rule is that a demand for performance is not necessary unless required by the terms of the contract or its peculiar nature. . . . In this case, the warranty was absolute. There was no contractual provision for notice. The law would imply none, for the defendants were not required to perform any act. Liability accrued for damages in accord with the appropriate measure of the case immediately after the warranty was breached by the occurrence of seepage. Even in the case of warranties in connection with the sale of personal property, absent code provisions, failure to give notice does not bar the right to damages.

Since neither Nebraska law nor the Albee-Maverick agreement required notice in the event of a breach of warranty, the district court erred in its decision that, as a matter of law, absence of notice from Maverick precluded a setoff to Maverick on the Platte Valley Shopper account. Consequently, Maverick is entitled to a setoff for the Platte Valley Shopper account. Although Maverick contends that the entire amount of the Platte Valley Shopper account, i.e., $29,918.64, is available as a setoff, undisputed evidence establishes that Maverick, as a result of the settlement of the Platte Valley

Shopper account, received $2,000 in cash and property valued at $300, or a settlement of $2,300 on the account. Albees must receive credit for the $2,300 which Maverick received on the Platte Valley Shopper account, lest Maverick obtain a partial double recovery on the Platte Valley Shopper account. Therefore, when Albees are given credit for the $2,300 received by Maverick on the Platte Valley Shopper account, the balance of that account is $27,618.64 as the correct amount allowable for a setoff attributable to the Platte Valley Shopper account. Hence, Maverick is entitled to a setoff of $27,618.64 for the Platte Valley Shopper account and the additional setoff of $17,661.39, which is the amount allowed by the district court regarding all other accounts receivable, for a total setoff of $45,280.03 concerning noncollectible accounts receivable involved in Albees' warranty.

Prejudgment Interest.

Maverick also claims that the district court should have awarded Maverick prejudgment interest on the amount of damages sustained from Albees' breach of warranty on the accounts receivable. We have held:

> Neb. Rev. Stat. § 45-103.02 (Reissue 1988) prescribes the conditions for allowance of prejudgment interest on all causes of action accruing on or after January 1, 1987, subject to the exclusions in Neb. Rev. Stat. § 45-103.04 (Reissue 1988), and states: "[J]udgment interest shall also accrue on decrees and judgments for the payment of money from the date of the plaintiff's first offer of settlement which is exceeded by the judgment until the rendition of judgment if all of the following conditions are met:
>
> "(1) The offer is made in writing upon the defendant by certified mail, return receipt requested, to allow judgment to be taken in accordance with the terms and conditions stated in the offer . . . ." Section 45-103.04 provides:
>
> "Judgment interest shall not accrue prior to the date of rendition of judgment for:
>
> "(1) Any action arising under Chapter 42; or
>
> "(2) Any action involving the state, a political

> subdivision of the state, or any employee of the state or any of its political subdivisions for any negligent or wrongful act or omission accruing within the scope of such employee's office or employment."

Knox v. Cook, 233 Neb. 387, 393-94, 446 N.W.2d 1, 5 (1989).

Any breach of warranty asserted by Maverick occurred before January 1, 1987. Accordingly,

> "Prejudgment interest is allowed where the amount of the claim is liquidated. When reasonable controversy exists concerning the claimant's right to recover or the amount of such recovery, the claim is unliquidated, and prejudgment interest is not allowed. *Graff v. Burnett*, 226 Neb. 710, 414 N.W.2d 271 (1987); *Fee v. Fee*, 223 Neb. 128, 388 N.W.2d 122 (1986)." *Lutheran Medical Center v. City of Omaha*, 229 Neb. 802, 810, 429 N.W.2d 347, 352 (1988).

Knox v. Cook, supra at 394, 446 N.W.2d at 5.

In the present appeal, collectibility of accounts receivable fluctuated and was even subject to discretionary compromise and settlement as an aspect of collectibility, which was demonstrated in Maverick's disposition of the Platte Valley Shopper account. Thus, the amount due under the agreement varied, depending on collectibility and eventual actual collection, and was, therefore, an uncertain amount. Moreover, the record fails to show that the amount of the uncollectible accounts receivable was ever definitely determined or agreed to by the parties so that the amount became liquidated by specific terms of the agreement. Thus, the district court correctly denied Maverick's request for prejudgment interest.

Recovery for Cost of Collection.

Maverick claims that it should have received a credit of $1,252.19 for expenses incurred in its attempt to collect the accounts receivable. Pursuant to the contract, Maverick was entitled to be indemnified and held harmless from and against any losses, including all costs, expenses, and fees arising out of the breach of any representation, warranty, or covenant in the agreement. Albees warranted that the accounts receivable were

collectible in the ordinary course of business. Under the contract, Maverick must bear the expense of collection in the "ordinary course of business." Consequently, Maverick may recover only expenses for collection attempts outside the ordinary course of business. The Albee-Maverick agreement has no characterization or definition for "in the ordinary course of business." The general and usual conduct of business for Albee Printing Co. was a printing service in exchange for payment by its customers. Accounts receivable in the ordinary course of business for that printing service were those customer debts payable when due or on the creditor's demand without the necessity of intervention by a third party to obtain payment of the account. Nothing indicated that special efforts would be required for collection of any account at the time of the agreement between Albees and Maverick or that payment of any account was impaired or jeopardized by a debtor's precarious financial condition. Nonetheless, Maverick, even in joint efforts with some of the Albees, directly communicated with debtors for payment on the accounts receivable. The district court concluded that collection through litigation was outside the ordinary course of business. Nothing contradicts that conclusion. Yet, all the collection cost of $1,252.19 was outside the "ordinary course of business" and was, therefore, a loss subject to the indemnification provision in the Albee-Maverick agreement. Thus, Maverick is entitled to expenses of $1,252.19 pertaining to collection of accounts receivable.

ALBEES' CROSS-APPEAL

Albees contend that the district court erred in finding that paragraph 4.1(p) of the purchase agreement was unambiguous, in awarding Maverick a setoff without any evidence that Maverick attempted to collect the accounts in the "ordinary course of business," and in failing to award Albees prejudgment interest from the date of the sale.

Ambiguity of Paragraph 4.1(p).

Albees contend that the "warranty" in paragraph 4.1(p) of the agreement is ambiguous and, therefore, requires interpretation.

Whether a document is ambiguous is a question of law initially determined by a trial court. *Luschen Bldg. Assn. v. Fleming Cos.*, 226 Neb. 840, 415 N.W.2d 453 (1987). "Regarding a question of law, an appellate court has an obligation to reach a conclusion independent from a trial court's conclusion in a judgment under review." *Huffman v. Huffman*, 232 Neb. 742, 748, 441 N.W.2d 899, 904 (1989). See, also, *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).

Ambiguity exists in an instrument when a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. *In re Estate of Walker*, 224 Neb. 812, 402 N.W.2d 251 (1987). See, also, *National Farmers Union Serv. Corp. v. Edwards*, 220 Neb. 231, 369 N.W.2d 76 (1985) (a document is ambiguous if, after application of the pertinent rules for construction, there is uncertainty concerning which of two or more reasonable meanings represents the intention of the parties). The fact that parties to a document have or suggest opposing interpretations of the document does not necessarily, or by itself, compel the conclusion that the document is ambiguous. *Lueder Constr. Co. v. Lincoln Electric Sys.*, 228 Neb. 707, 424 N.W.2d 126 (1988). If the contents of a document are unambiguous, the document is not subject to interpretation and construction, and the intention of the parties to the document must be determined from the contents of the document. *Fisbeck v. Scherbarth, Inc.*, 229 Neb. 453, 428 N.W.2d 141 (1988).

Knox v. Cook, 233 Neb. 387, 391-92, 446 N.W.2d 1, 4 (1989).

Under paragraph 4.1(p) of the agreement, Albees warranted collectibility of accounts receivable, that is, "accounts receivable of Albee which are collectible in the ordinary course of business with the exceptions noted therein [are] attached hereto as Schedule 6 and Sellers agree to update any changes in the accounts receivable up to the date of closing."

Although one of the Albees testified that, in her belief, paragraph 4.1(p) was only a promise to present Maverick with a list of all accounts receivable and not a warranty that the

accounts were collectible, the express and unambiguous language of the agreement is: "Sellers [Albees] warrant [that] all of the accounts receivable . . . are collectible in the ordinary course of business . . . ." In light of the language in paragraph 4.1(p), the only reasonable interpretation is Albees' warranty that all accounts receivable were collectible in the ordinary course of business except those accounts specifically excluded. Consequently, a court must look solely to the contents of the contract to ascertain the parties' intention and not to a party's understanding or belief regarding the meaning of unambiguous language in a contract. The district court correctly determined that paragraph 4.1(p) was unambiguous.

Insufficiency of the Evidence.

Albees next contend that the district court erred in awarding Maverick a setoff in the absence of evidence that Maverick attempted to collect the accounts in the "ordinary course of business." However, often with the help of Albees, Maverick mailed bills and telephoned account debtors in efforts to obtain payment. Also, Maverick hired I.C. Systems, a collection agency, and several law firms to assist in Maverick's collection efforts. In some instances, Maverick even resorted to litigation to collect accounts receivable. Thus, Maverick presented prima facie evidence that Maverick attempted to collect the accounts receivable in the "ordinary course of business." See *State v. Jasper*, 237 Neb. 754, 758, 467 N.W.2d 855, 858 (1991):

> "Prima facie evidence" means that proof presented on an issue is sufficient to submit the issue to the fact finder for disposition and precludes a directed verdict against the party with the burden of proof on the issue in a jury trial or exclusion of a particular issue from consideration in a nonjury trial.

See, also, *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 546, 451 N.W.2d 910, 916 (1990): "[A]s the result of prima facie proof on an issue, an adversary has the burden of producing evidence to the contrary or risks an adverse finding on the issue for which there is prima facie proof." Consequently, evidence supports the district court's determination that Maverick attempted to collect accounts receivable in the ordinary course

of business.

Prejudgment Interest.

Finally, Albees claim that the district court erred in denying Albees prejudgment interest from the date of the sale. However, after the correct setoff and indemnification for collection cost, that is, $46,532.22, and after credit for Maverick's tender of $2,419.97, or a total of $48,952.19, there remained $1,047.81 on the purchase price under the Albee-Maverick agreement. Nevertheless, since the unpaid balance of the purchase price was uncertain on account of the disputed setoff and indemnified loss, prejudgment interest was inappropriate under the circumstances. For that reason, the district court correctly held that Albees were not entitled to prejudgment interest, because Maverick did not breach any of its contractual obligations imposed by the Albee-Maverick agreement.

CONCLUSIONS

In summary, Maverick owed $50,000 as the balance of the purchase price specified by the agreement with Albees. However, Maverick was entitled to a setoff based on Albees' breach of warranty on the accounts receivable, a setoff of $45,280.03 as previously indicated in this opinion. In addition to the setoff, Maverick is entitled to recover from Albees $1,252.19, the damages attributable to collection costs from the breach of warranty on the accounts receivable. The combined sum of the corrected setoff and the indemnified loss is $46,532.22 ($45,280.03 plus $1,252.19 equals $46,532.22). Therefore, after allowance for the correct setoff and indemnity, there is due Albees $3,467.78 as the balance of the purchase price under the agreement with Maverick, less credit for the $2,419.97 held by the escrow agent for Albees.

Consequently, we affirm the district court's judgment that Maverick owed Albees $50,000 as the balance of the purchase price specified in the Albee-Maverick agreement, but we reverse the district court's judgment concerning the setoff allowed Maverick and, as a matter of law, conclude that the correct amount of the judgment by setoff for Maverick is $45,280.03 under the Albee-Maverick agreement. We also reverse the district court's judgment that Maverick was not entitled to

recover collection expenses and, as a matter of law, modify the district court's judgment so that Maverick shall have judgment against Albees for $1,252.19, the indemnified damages from the cost of collecting the accounts receivable warranted under the agreement. In all other respects, the district court's judgment is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND MODIFIED.

A.G.A. INC., APPELLEE, V. FIRST NATIONAL BANK, HOLDREGE, NEBRASKA, APPELLANT.

474 N.W.2d 655

Filed September 13, 1991. No. 89-454.

1. **Summary Judgment.** Summary judgment is properly granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In an appellate review of a summary judgment, this court reviews the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Escrow.** Money may be delivered in escrow.
4. **Contracts: Agency: Escrow: Negligence: Liability.** Where a person assumes to and does act as the depositary in escrow, he is absolutely bound by the terms and conditions of the deposit and charged with a strict execution of the duties voluntarily assumed. He is held to strict compliance with the terms of the escrow agreement. If he violates instructions or acts negligently, he is ordinarily liable for any loss occasioned by his breach of duty.
5. **Prejudgment Interest: Claims.** Prejudgment interest may not be awarded on unliquidated claims. A claim is unliquidated where a reasonable controversy exists either as to the right to recover or as to the amount of such recovery.

Appeal from the District Court for Phelps County: BERNARD SPRAGUE, Judge. Affirmed.

Patrick J. Nelson, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellant.

Kenneth F. George, of State, Yeagley & George, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

In this action, the plaintiff, A.G.A. Inc. (A.G.A.), sought to recover damages from the defendant, First National Bank, Holdrege, Nebraska (Bank), in connection with the Bank's receipt, as escrow agent, of an $11,100 payment made by A.G.A. in accordance with an installment contract for the sale of land. A.G.A. proceeded on theories of conversion, breach of contract, negligence, breach of fiduciary duty, and money had and received by the Bank for the use of A.G.A.

The district court sustained A.G.A.'s motion for summary judgment and awarded A.G.A. damages of $11,100 and prejudgment interest of $4,853.59. The Bank has appealed, contending the trial court erred (1) in overruling the Bank's demurrer, (2) in overruling the Bank's motion for summary judgment, (3) in sustaining A.G.A.'s motion for summary judgment, (4) in awarding A.G.A. damages, and (5) in awarding A.G.A. prejudgment interest.

We have said that summary judgment is properly granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such facts and that the moving party is entitled to judgment as a matter of law. *Logan Ranch v. Farm Credit Bank*, 238 Neb. 814, 472 N.W.2d 704 (1991). After the movant has shown facts entitling the movant to summary judgment as a matter of law, the opposing party has the burden of presenting evidence to show an issue of material fact which prevents a judgment as a matter of law. *Id.* In an appellate review of a summary judgment, this court reviews the evidence in a light most favorable to the party against whom the judgment was granted and gives such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

The record shows that on July 23, 1982, A.G.A.'s predecessors in interest, Arlynn and Emily Aldinger, purchased 160 acres of farmland and related personal property from

Ronald and Connie Strasburger pursuant to an "installment sale land contract" in which the Bank was nominated as escrow agent. The parties agreed that the purchase price of $380,000 would be paid as follows:

> (A.) The sum of Five Thousand and no/100 Dollars ($5,000.00) has been paid by Buyers to Sellers prior to the execution of this Contract . . . .
>
> (B.) The sum of Forty-five Thousand and no/100 Dollars ($45,000.00) to be paid July 20, 1982 and upon signing of this Contract by both Buyers and Sellers
>
> (C.) The sum of Forty Thousand and no/100 Dollars ($40,000.00) on March 1, 1983.
>
> (D.) The balance of Two Hundred Ninety Thousand and no/100 Dollars shall be paid in the form of Four (4) annual installments of $23,949.96 each, plus interest at 14% per annum from and after March 1, 1983, with the 1st. payment of $23,949.96, plus interest to be due March 1, 1984, and like amounts on the first day of each and every March thereafter until March 1, 1987 when final installment will be due, and with the total principal paid to Sellers during the four (4) year period to be in the amount of $95,799.85, and which total amount liquidates the Seller's equity upon payment of the fourth (4th.) installment due March 1, 1987.
>
> The remaining balance of $194,200.15 is the balance unpaid on a certain First mortgage in favor of John Hancock Mutual Life Insurance Company now of record against said property, after the principal payment and interest is paid by Sellers on March 1, 1983, and which mortgage calls for semi-annual payments of $11,100.00, which includes interest at rate of 10¼% per annum, and Buyers to pay these payments to the Sellers on Sept. 1 and March 1, from and after March 1, 1983, and the Sellers will in turn pay such payments to the said mortgagee so as to keep said mortgage payments current and paid during term of this contract, and on March 1, 1987, and at time of delivery of deed and bill of sale from said escrow agent, the Buyers will assume and pay the unpaid principal balance then remaining unpaid on said First Mortgage,

> and as a part of the total consideration set forth in this contract.

This case concerns the $11,100 mortgage payment due September 1, 1985.

Contract paragraph 8 contained the following escrow provisions:

> A warranty deed to the real estate and a bill of sale to the personal property described herein is to be executed and signed simultanously [sic] herewith from Sellers to Buyers, which deed and bill of sale is to be held in escrow by the First National Bank, Holdrege, Nebraska, who are hereby designated and authorized to act as the escrow agent in this transaction, and who are hereby authorized by Sellers to receive all payments of money as set forth in this contract from and after March 1, 1983 to be paid by Buyers, and are authorized and directed to deliver the said warranty deed and bill of sale to said Buyers upon receipt from Buyers of all the payments of money to be paid by them under terms and agreements set forth in this contract.

On July 26, 1982, the Bank's escrow officer signed the "Escrow Acceptance," found on the last page of the contract, which provided: "We, the undersigned, First National Bank, of Holdrege, Nebraska acknowledge receipt of the heretofore mentioned warranty deed and bill of sale and a signed copy of this contract and agree to act as the escrow agent as provided herein."

In December 1983, the Aldingers incorporated their farming operation and, in exchange for A.G.A.'s stock, conveyed and assigned their rights, title, and interest in the contract to A.G.A.

A.G.A. and the Aldingers made a number of payments pursuant to the contract, in each instance delivering a check to the Bank, which accepted the payments on behalf of and acting for the Strasburgers. The check at issue in this action was made payable to "Ron Strasburger Land Account First National Bank" in the amount of $11,100. The check was dated and delivered to the Bank on August 28, 1985. On or about August 29, 1985, the check was presented for payment and was paid.

At some time after the Bank received the check, it applied the full amount directly against and in reduction of certain indebtedness then owed to the Bank by the Strasburgers, and did not apply the check proceeds to the Hancock mortgage. Consequently, in January 1987, Hancock foreclosed its mortgage, completely terminating the rights of A.G.A. in and to the property.

Reviewing the evidence in the light most favorable to the Bank, it is clear that the Bank breached its contract to act as escrow in this transaction. The Bank contends that, as escrow, it only had the duty to hold and deliver the deed and bill of sale upon receipt from A.G.A. of all payments of money to be paid by it under terms and agreements set forth in the contract, and claims it had no contractual duty to see that the $11,100 check was used to pay the Hancock mortgage. We disagree.

The Bank agreed to act as the escrow agent as provided in the contract. Pursuant to the contract, the Bank was "designated and authorized to act as the escrow agent in this transaction" and was "authorized by [Strasburgers] to receive all payments of money *as set forth in this contract* from and after March 1, 1983 to be paid by [A.G.A.]." (Emphasis supplied.) The contract clearly and specifically provides that the $11,100 payments to be made by A.G.A. on March 1 and September 1 were to be applied to the Hancock mortgage so as to keep the mortgage payments current and paid during the term of the contract.

In *Katleman v. U. S. Communities, Inc.*, 197 Neb. 443, 447, 249 N.W.2d 898, 901 (1977), this court said:

> While escrows traditionally involve documents, it is no longer open to question that money may also be delivered in escrow. . . .
>
> Where a person assumes to and does act as the depositary in escrow, he is absolutely bound by the terms and conditions of the deposit and charged with a strict execution of the duties voluntarily assumed. He is held to strict compliance with the terms of the escrow agreement. If he violates instructions or acts negligently, he is ordinarily liable for any loss occasioned by his breach of duty.

See, also, *Everlasting Golden Rule Ch. v. Dakota Title*, 230 Neb. 590, 432 N.W.2d 803 (1988).

In general, in an arrangement of this type, the escrow agent is the agent of both parties. See, e.g., 28 Am. Jur. 2d *Escrow* § 11 (1966). Even if it is assumed that the Bank was acting solely as the agent of the Strasburgers in accepting payments due under the contract, Strasburgers were bound by the contract to apply the payment in question to the Hancock mortgage and were not free to direct the Bank to apply A.G.A.'s $11,100 payment to another debt.

Once the Bank, as escrow agent, voluntarily began receiving and accepting the mortgage payments required to be made pursuant to the contract, the Bank was required to strictly comply with the terms of the contract regarding the disposition of the payments it received. It did not do so. There is no question of fact as to the Bank's liability, and the district court properly sustained A.G.A.'s motion for summary judgment.

The Bank also contends the district court erred in awarding A.G.A. prejudgment interest. Neb. Rev. Stat. § 45-103.02 (Reissue 1988), relating to prejudgment interest, does not apply to causes of action which accrued prior to January 1, 1987. See, 1986 Neb. Laws, L.B. 298; *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989). Since the cause of action in this case accrued in 1985, § 45-103.02 does not apply.

Prejudgment interest may not be awarded on unliquidated claims. In *Atokad Ag. & Racing v. Governors of Knts. of Ak-Sar-Ben*, 237 Neb. 317, 325, 466 N.W.2d 73, 79 (1991), we said:

> "A claim is unliquidated where a reasonable controversy exists either as to the right to recover or as to the amount of such recovery." *Suess v. Lee Sapp Leasing*, 229 Neb. 755, 764, 428 N.W.2d 899, 905 (1988). A two-pronged inquiry is required. There must be no dispute either as to the amount due or as to the plaintiff's right to recover, or both.

See, also, *Otto Farms v. First Nat. Bank of York*, 228 Neb. 287, 422 N.W.2d 331 (1988).

In this case, there was no dispute as to the amount due and no reasonable controversy regarding the Bank's liability to A.G.A.

Under the circumstances, the district court did not err in awarding A.G.A. prejudgment interest.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD L. LAYMON, APPELLANT.

474 N.W.2d 458

Filed September 13, 1991. No. 90-384.

1. **Indictments and Informations: Complaints.** An information or complaint must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for the same offense.
2. **Indictments and Informations: Complaints: Appeal and Error.** When the information or complaint is questioned for the first time on appeal, it must be held sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted. Furthermore, if the defect is amendable, it will be held sufficient on appeal absent an objection in the trial court.
3. **Indictments and Informations: Complaints: Pretrial Procedure: Waiver: Pleas: Jurisdiction.** A defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads not guilty and proceeds to trial, provided the information or complaint contains no jurisdictional defect and is sufficient to charge an offense under the law.
4. **Indictments and Informations: Complaints: Pretrial Procedure: Waiver.** Defects and omissions which pertain to the form of the complaint or information or to the fact that the information or complaint is inartfully drawn are waived by not objecting at the preliminary stages of the proceeding.
5. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.

Appeal from the District Court for Lancaster County, BERNARD J. MCGINN, Judge, on appeal thereto from the County Court for Lancaster County, JAMES L. FOSTER, Judge. Affirmed.

Calvin D. Hansen for appellant.

Norman Langemach, Jr., Lincoln City Prosecutor, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The defendant, Richard L. Laymon, was convicted of indecent exposure and fined $100 and costs by the Lancaster County Court. Upon appeal to the district court, the judgment was affirmed. The defendant has now appealed to this court, assigning as error the district court's failure to find the complaint was defective and that the evidence was insufficient as a matter of law to support the judgment.

The record shows that on August 14, 1989, James M. Barker, the assistant security director for Gateway Shopping Center in Lincoln, Nebraska, observed the defendant in the lower level men's restroom at the mall. Barker first observed the defendant standing at a urinal. After Barker washed and dried his hands, he left the restroom to report his findings to the security director.

On the security director's recommendation, Barker reentered the restroom to continue to monitor the defendant. At this time, the defendant was standing at the urinal facing the wall. Barker entered the toilet stall or booth which was directly opposite and behind the defendant. The defendant moved away from the urinal and looked through the crack near the door into Barker's stall.

When another individual entered the restroom and occupied the stall next to Barker, the defendant moved back to the urinal. A minute later, the defendant again came back and looked into Barker's stall for a few seconds and then moved over to the next stall. When the defendant came back to Barker's stall, Barker observed the defendant masturbating. According to Barker, the defendant had his pants unzipped, was holding his penis in his right hand, and was masturbating. After the defendant had continued this activity for 10 to 15 seconds, Barker left the stall, identified himself, and requested the defendant to accompany

him to the mall's security office.

Barker did not identify the other individual in the restroom, and he did not talk to him following the incident. Barker does not know whether the other individual saw the defendant.

The Lincoln police were called to the scene and the defendant was arrested. Referring to Lincoln Mun. Code § 9.52.100 (1984), the complaint charged the defendant with committing indecent exposure on August 14, 1989, in the lower level bathroom of the Gateway mall in Lincoln, Lancaster County, Nebraska.

The defendant contends the complaint filed against him failed to provide adequate notice of the charge and violated due process of law because it did not set forth the requisite elements of the offense as contained in § 9.52.100.

Section 9.52.100 states:

> **Public indecency and indecent exposure prohibited.** (a) It shall be unlawful for any person, in a public place or on private premises, and under circumstances in which he or she knows or reasonably should know that his or her conduct may readily be observed from either a public place or other private premises, (1) to perform an act of sexual penetration; (2) to fondle or caress the genitals of another person of the same or opposite sex; or (3) to intentionally or recklessly expose his or her genitals in such a manner or under such circumstances as to affront or alarm another person.

At his arraignment on August 31, 1989, the defendant entered a plea of not guilty. When questioned by the court as to whether he understood what he was charged with, the defendant replied affirmatively.

An information or complaint must allege each essential element of the crime charged, expressed in the words of the statute which prohibits the conduct charged as a crime or in terms equivalent to the statutory definition. *State v. Schaaf*, 234 Neb. 144, 449 N.W.2d 762 (1989). " '[A]n information or complaint must inform the accused, with reasonable certainty, of the charge being made against him in order that he may prepare his defense thereto and also be able to plead the judgment rendered thereon as a bar to a later prosecution for

the same offense.' " *State v. Lingle*, 209 Neb. 492, 497, 308 N.W.2d 531, 535 (1981).

When the information or complaint is questioned for the first time on appeal, it must be held sufficient unless it is so defective that by no construction can it be said to charge the offense of which the accused was convicted. *Id.* Furthermore, if the defect is amendable, it will be held sufficient on appeal absent an objection in the trial court. *Id.*

In this case, the issue as to the form of the complaint could have been raised by a motion to quash. See Neb. Rev. Stat. § 29-1808 (Reissue 1989). A defect in the manner of charging an offense is waived if, upon being arraigned, the defendant pleads not guilty and proceeds to trial, provided the information or complaint contains no jurisdictional defect and is sufficient to charge an offense under the law. *Nelson v. State*, 167 Neb. 575, 94 N.W.2d 1 (1959). Defects and omissions which pertain to the form of the complaint or information or to the fact that the information or complaint is inartfully drawn are waived by not objecting at the preliminary stages of the proceeding or, as to some matters, before determination of the issue on the merits. *Id.*

The uniform form of complaint which was used in this case is not well suited for use in charging an offense such as indecent exposure. However, the complaint in this case contains the essential allegations of the crime and informed the defendant of the charge made against him. Even if a complaint is found to be insufficient or defective, it may be amended, and the defendant in this case failed to challenge the complaint until his appeal in this court. Consequently, the defendant's assignment of error regarding the adequacy of the complaint is without merit.

The defendant's second assignment of error, regarding the sufficiency of the evidence, is also without merit.

> "In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them."

State v. Cortis, 237 Neb. 97, 110, 465 N.W.2d 132, 142 (1991).

> " 'On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.' "

Id. at 110-11, 465 N.W.2d at 142.

The testimony of Barker shows that when the defendant was at the Gateway mall, a public place, and under circumstances in which he knew that his conduct could be readily observed from the toilet stall in the men's restroom, he intentionally exposed his genitals in such a manner as to affront or alarm another person.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RICHARD SCHWARTZ, APPELLANT.

474 N.W.2d 461

Filed September 13, 1991. No. 90-714.

1. **Motions to Suppress: Appeal and Error.** When a motion to suppress is overruled, the defendant must make a specific objection at trial to the offer of the evidence which was the subject of the motion to suppress in order to preserve the issue for review on appeal.
2. **Constitutional Law: Identification Procedures: Due Process.** Invalidation of an identification procedure is constitutionally mandated only when the procedure is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law.
3. **Constitutional Law: Trial: Identification Procedures.** The admission of evidence from an unnecessarily suggestive pretrial identification procedure may be constitutional.
4. **Motions to Suppress: Identification Procedures: Due Process.** If the totality of the circumstances indicates that a suggestive pretrial identification was reliable, due process of law does not require that the identification evidence be suppressed.

5. **Trial: Identification Procedures.** The factors to consider when determining the reliability of a suggestive pretrial identification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his or her prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. These factors are to be weighed against the corrupting effect of the suggestive identification itself.
6. **Trial: Evidence: Appeal and Error.** The erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the finding by the trier of fact.
7. **Investigative Stops: Probable Cause.** An investigatory stop will be upheld if justified by an objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity.
8. **Police Officers and Sheriffs: Arrests: Probable Cause.** The test of probable cause to support a warrantless arrest is whether at the moment the facts and circumstances within the arresting officers' knowledge and of which they had reasonably trustworthy information were sufficient to justify a prudent person in believing the defendant had committed or was committing an offense.
9. **Search and Seizure: Motor Vehicles: Investigative Stops.** The occupants of a vehicle may be searched pursuant to a lawful investigatory stop prior to arrest to the extent necessary to secure the safety of the investigating officers.
10. **Trial: Rules of Evidence.** In proceedings where the statutes embodying the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility.
11. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
12. **Criminal Law: Directed Verdict.** A criminal defendant who moves for a directed verdict at the close of the State's evidence and who, upon the overruling of such motion, proceeds with trial and introduces evidence waives any error in the ruling on the motion for a directed verdict.
13. _____: _____. A directed verdict in a criminal case is appropriate only when there is a complete failure of evidence to establish an essential element of the crime charged or when the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained.
14. **Criminal Law: Directed Verdict: Appeal and Error.** In an appellate court's consideration of a defendant's motion for a directed verdict, the State is entitled to have all its relevant evidence accepted as true, every controverted fact resolved in its favor, and every beneficial inference reasonably deducible from the evidence.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed.

Gerard A. Piccolo, Hall County Public Defender, for appellant.

Mark J. Young, Deputy Hall County Attorney, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

I. INTRODUCTION

Pursuant to verdict, defendant-appellant, Richard Schwartz, was adjudged guilty of robbery, in violation of Neb. Rev. Stat. § 28-324 (Reissue 1989), and of the use of a weapon to commit a felony, in violation of Neb. Rev. Stat. § 28-1205 (Reissue 1989), and thereafter sentenced. In summary, Schwartz assigns as error the district court's (1) overruling his pretrial motions to suppress certain evidence, (2) admitting certain evidence, and (3) overruling his motion for directed verdict made at the close of the State's case in chief. We affirm.

II. FACTS

At approximately 10:15 p.m. on July 2, 1989, the front desk clerk of a Grand Island motel noticed a man wearing a white jogging suit running around the west wing of the motel. Shortly thereafter, upon hearing someone greet her informally, the clerk looked up from the book she was reading and saw a man standing a few feet away across the front desk counter, pointing a gun at her and demanding money. Fearing for her life, the clerk cooperated with the man's demand, giving him money from a cash register, stamp fund drawer, and safe. The man placed all the money into one of the two bags in which the money in the safe had been kept and ordered the clerk to shut herself into a back office. Apparently, he then left. The clerk hesitated for "probably a minute," after which she called the police.

The clerk described the perpetrator as being approximately 5 feet 11 inches tall and weighing 180 pounds, with short, wavy, reddish-blond hair and a red mustache, and wearing a white jogging suit. She later estimated that the perpetrator had taken between $800 and $1,000. The motel's bookkeeper testified that based upon her investigation, $879.50 was missing from the

motel following the robbery.

A witness testifying at a suppression hearing but not at the trial stated that at approximately 10:15 on the night of July 2, 1989, he was pulling into a convenience store located about two blocks north of the subject motel. As he was about to get out of his vehicle, he noticed a man, dressed in white and running very fast, round the corner of an adjacent building located between the convenience store and the motel. This man next "bail[ed] into" a "gray or charcoal gray" pickup truck backed into a space next to the aforementioned building adjacent to the convenience store. Because the witness thought it unusual, he "took a few . . . observations" and "made some . . . little mental notes" as he was entering the convenience store and the pickup truck was being driven away.

Upon leaving the convenience store, the witness saw a police cruiser go by at a rapid rate of speed. "[B]ecause of the unusual circumstances of somebody running" and jumping into a vehicle backed into a parking space, and feeling that "something had happened," the witness followed the police cruiser to the motel. He walked into the motel and, upon hearing "the gal behind the front desk" give a physical description to a police officer, asked if the man was wearing white clothing. Upon receiving an affirmative response, the witness apparently related his observations to the officer, including a description of the pickup truck, which he then characterized as a "Chevy short box pickup" having a "dark color."

At trial, Officer Alan Kosmicki of the Grand Island Police Department testified that he was the officer who responded to the call at the motel on the night of July 2, 1989. After talking with the clerk and the aforedescribed witness, Kosmicki broadcast information concerning the reported armed robbery, including the vehicular description he had been given.

At approximately 10:30 on the same night, Hall County Deputy Sheriff David Waskowiak, while on patrol, saw a dark-colored Chevrolet short box pickup truck answering the description of the vehicle suspected in the robbery of the motel. Waskowiak stopped the pickup truck, whereupon the driver, a woman, got out and approached Waskowiak's vehicle.

Waskowiak asked the driver the hair color of the other occupant in the vehicle, to which she responded brown or reddish. During this conversation, Waskowiak saw the passenger door of the pickup truck open a distance of 2 or 3 inches and noted that it remained so for 20 to 30 seconds. Waskowiak had the woman get back into the pickup truck.

By this time, other law enforcement officers had arrived at the scene. Schwartz, dressed in blue cutoff shorts, white socks, brown suede shoes, and no shirt, was identified as the passenger in the pickup truck.

Police found a pistol, identified by the clerk as the weapon used during the robbery, on the ground just outside the passenger door of the pickup truck. Sgt. Kerry Mehlin of the Grand Island Police Department, one of the officers who arrived at the scene subsequent to Waskowiak's stop of the pickup truck, identified certain money and cash register tapes with handwriting on them as items found on the seat, under the seat, and on the floor of the pickup truck. The register tapes were attached to some of the bills. The amount of money recovered totaled $838.

Police took the clerk to the scene, where she was shown a person seated with a police officer in a police vehicle. She identified Schwartz as the man who had committed the robbery.

On July 3, 1989, a Grand Island resident found a white fleece jogging suit, rolled into a ball, in her yard. The suit, when unwrapped, was found to contain a bank bag with the motel's label. The clerk identified the bag as the one the perpetrator had taken during the robbery.

The driver of the pickup truck testified as part of a plea bargain agreement with the State. She said that she had been with Schwartz on July 2, 1989, and that on that evening she and Schwartz, who was dressed in a jogging suit, were parked in the area of the convenience store near the motel. She further testified that at some point, Schwartz got out of the pickup truck and went in the direction of the motel. Upon his return, Schwartz, who was gone for "[t]en, 15 minutes at the most," instructed the woman to drive them away.

III. ANALYSIS

1. Nonsuppression of Evidence

The first summarized assignment of error challenges the overruling of Schwartz' motion to suppress his identification by the clerk and the overruling of his motion to suppress the "arrest and subsequent search and seizure."

(a) Identification

We begin our analysis of the identification issue by noting that Schwartz offered no objection to the clerk's in-court identification of him as the person who committed the robbery at gunpoint. While it is true that he made a hearsay objection to the clerk's further testimony that he was the man she identified for police at the scene of the stop and arrest, he makes no present claim that such testimony was inadmissible as hearsay.

The State correctly suggests that Schwartz' failure to specifically object during trial to the identification at the scene of the stop and arrest as being the result of an unduly suggestive pretrial identification procedure should result in a waiver of this claim of error. When a motion to suppress is overruled, the defendant must make a specific objection at trial to the offer of the evidence which was the subject of the motion to suppress in order to preserve the issue for review on appeal. *State v. Mahlin*, 236 Neb. 818, 464 N.W.2d 312 (1991).

Not only is the hearsay objection raised at trial not urged on appeal, no claim was made at trial that the identification testimony was the result of an unduly suggestive pretrial identification procedure. Thus, as the testimony was not specifically objected to on the same grounds as raised during the motion to suppress and again on appeal, this claim of error has been waived.

In any event, the identification procedure employed was not impermissible. Invalidation of an identification procedure is constitutionally mandated only when the procedure is so unnecessarily suggestive and conducive to an irreparably mistaken identification that a defendant is denied due process of law. *State v. Sanders*, 235 Neb. 183, 455 N.W.2d 108 (1990). The U.S. Supreme Court has held that the admission of evidence from an unnecessarily suggestive pretrial

identification procedure may nonetheless be constitutional. See *Manson v. Brathwaite*, 432 U.S. 98, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977).

Manson, supra, relied on *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972), to hold that if the totality of the circumstances indicated that the suggestive identification was nonetheless reliable, due process of law did not require that the identification evidence be suppressed. The *Manson* Court held that the factors to consider when determining the reliability of the identification, as required by *Neil, supra*,

> include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

Manson, supra at 432 U.S. at 114. This mode of analysis has been adopted and employed by this court. See, *Sanders, supra*; *State v. Garcia*, 235 Neb. 53, 453 N.W.2d 469 (1990).

If we assume, without deciding, that the identification procedure used in this case was unduly suggestive, application of the aforementioned factors to the facts of this case demonstrates that the identification was sufficiently reliable to avoid suppression on constitutional grounds.

The very proximity of the clerk and the perpetrator during the robbery dictates that the clerk's opportunity to view the perpetrator was good. Likewise, the clerk's degree of attention was high. Schwartz has made no showing that the clerk's description of the perpetrator varied from his physical characteristics. Indeed, a comparison of her description of the perpetrator and the description of Schwartz contained in the presentence investigation report reveals a high degree of similarity between the two. The clerk's level of certainty in her identification of Schwartz was also high, there being no indication whatsoever that she ever wavered from her conclusion that he was the person who robbed the motel. Finally, the short timespan between the robbery and the identification weighs heavily in favor of an accurate

description. These indications of the clerk's ability to make an accurate description are hardly outweighed by the alleged corrupting effect of the challenged identification itself. Thus cloaked with these indicia of reliability, the identification procedure employed in this case was not constitutionally invalid.

Another consideration is the fact that Schwartz made no objection whatsoever to the clerk's in-court identification, which was wholly separate from the alleged unduly suggestive identification. Thus, even if the admission of the clerk's testimony regarding her pretrial identification of Schwartz were to have been erroneous, the error would have been harmless. *State v. Cox*, 231 Neb. 495, 504, 437 N.W.2d 134, 140 (1989) (holding that "[e]rroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the finding by the trier of fact").

(b) Arrest, Search, and Seizure

In his next assignment of error, Schwartz claims that the district court erred in overruling his pretrial motion to suppress the gun, holster, money, and cash register receipts discovered as the result of his being stopped, searched, seized, and arrested, all of which he claims to have been illegal. The State contends that Schwartz waived the issues presented, as his motion to suppress this evidence was overruled prior to trial, and he failed to timely and specifically object to the reception of the complained-of evidence at the trial itself. Schwartz lodged no objection against the testimony that he was in fact arrested. Likewise, no claim was made at trial that the gun, money, and receipts were the result of an illegal search, seizure, or arrest; the trial objections to these items were based on a claimed lack of foundation and relevance. Schwartz did, however, object to testimony that the police had found an empty holster on the seat of the pickup truck, on the ground that such evidence was illegally obtained; although this objection was overruled, the State made no further effort to pursue this line of inquiry.

Since Schwartz' pretrial motion to suppress was overruled

and he failed to specifically object to the receipt of such evidence at trial on the ground that it was illegally obtained, Schwartz' claim of error has indeed been waived. See *State v. Mahlin*, 236 Neb. 818, 464 N.W.2d 312 (1991).

In any event, the district court did not err in overruling Schwartz' motion to suppress. Schwartz begins his argument in support of his motion by claiming that Waskowiak had no probable cause to stop the pickup truck in which he was a passenger.

The reality is that the investigatory stop of the pickup truck is sanctioned by statute. Neb. Rev. Stat. § 29-829 (Reissue 1989) provides, in relevant part:

> A peace officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and may demand of him his name, address and an explanation of his actions. When a peace officer has stopped a person for questioning pursuant to this section and reasonably suspects he is in danger of life or limb, he may search such person for a dangerous weapon. If the peace officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

In applying this section to investigatory stops of vehicles, this court has been mindful of U.S. Supreme Court pronouncements regarding the fourth amendment to the federal Constitution, such as those found in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and *United States v. Cortez*, 449 U.S. 411, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981). See, e.g., *State v. Gross*, 225 Neb. 798, 408 N.W.2d 297 (1987); *State v. Pierce and Wells*, 215 Neb. 512, 340 N.W.2d 122 (1983); *State v. Nowicki*, 209 Neb. 640, 309 N.W.2d 89 (1981).

From these cases emerges the rule that an investigatory stop will be upheld if justified by an objective manifestation that the person stopped is, has been, or is about to be engaged in criminal activity. See *Gross, supra*. In this case, Waskowiak testified that he stopped the pickup truck because it answered the description of a vehicle reported to have been involved in an

area robbery a mere 15 minutes earlier. Given these circumstances, there is no merit to Schwartz' argument that the investigatory stop was not justified by an objective manifestation that the persons stopped had recently been engaged in criminal activity.

Schwartz also makes much of the fact that the record does not establish whether he was arrested before, during, or after the search of the pickup truck or perhaps after the clerk's identification. The only thing that is clear from the record is that Schwartz was arrested at some time after the stop of the pickup truck.

Thus, we first examine the situation as if Schwartz had been arrested immediately upon his discovery in the pickup truck. The question, under that assumption, becomes whether there then existed probable cause to arrest him.

The test of probable cause to support a warrantless arrest is whether at the moment the facts and circumstances within the arresting officers' knowledge and of which they had reasonably trustworthy information were sufficient to justify a prudent person in believing the defendant had committed or was committing an offense. *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991). Schwartz claims that an arrest prior to the clerk's identification could not be sustained under this standard because the record is silent as to whether Waskowiak at that time had any knowledge of the robber's description.

While Waskowiak's testimony does not specifically indicate that he was then aware of the robber's description, several facts of record support an inference that he was so informed. The record shows that the clerk related the perpetrator's description to Kosmicki, who subsequently broadcast some information over his police radio. The record further reflects that Waskowiak had heard a radio transmission regarding the robbery. Finally, and perhaps most importantly, Waskowiak, upon first making contact with the driver of the pickup truck, asked the color of her passenger's hair. These facts, when considered in conjunction with the fact that red hair was the predominant feature of the description of the robber, support an inference that Waskowiak was aware of the robber's description as he made the investigatory stop.

Under the foregoing definition of probable cause, it must be said that where a person answering the description of a suspected robber is found in a vehicle answering the description of the vehicle suspected in the same robbery, there exists probable cause to support a warrantless arrest of the suspected robber.

When that finding is coupled with this court's holdings that prior to arrest of the occupants a vehicle may be searched pursuant to a lawful investigatory stop to the extent necessary to secure the safety of the investigating officers, see, *Gross, supra*, and *Pierce and Wells, supra*, the actual time of arrest becomes less important. A prearrest search of the pickup truck was warranted under *Gross, supra*, and *Pierce and Wells, supra*, because the officers were dealing with an investigatory stop of a vehicle suspected to have been used in an armed robbery.

Logic dictates that as the arrest was not made until after the legal search pursuant to an investigatory stop, and as sufficient probable cause existed prior to the search to sustain a warrantless arrest, any such arrest subsequent to the search or identification is also supported by probable cause. Thus, regardless of when the arrest was actually made, it was supported by probable cause. Likewise, irrespective of whether the search and seizure were made prior to or subsequent to the arrest, they too were proper.

2. Receipt of Evidence

In the next summarized claim of error, Schwartz complains of the reception into evidence of the cash register tapes and money found in the pickup truck in which he was arrested. Specifically, he cites as error the reception of the clerk's testimony identifying handwritten initials on the register tapes and the acceptance into evidence of money not identified by the clerk or by serial numbers, or corresponding exactly with the amount of money the bookkeeper stated had been taken from the motel.

In support of these claims, Schwartz cites only to *State v. Thomas*, 232 Neb. 490, 441 N.W.2d 186 (1989), and *State v. Andersen*, 232 Neb. 187, 440 N.W.2d 203 (1989), for the

proposition that the admission of evidence is left to the discretion of the trial court, and to *State v. Lenz*, 227 Neb. 692, 419 N.W.2d 670 (1988), and *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988), for the proposition that an erroneous evidentiary ruling results in prejudice to the defendant unless the State demonstrates the error is harmless beyond a reasonable doubt. We point out once again that although this court has in the past declared the first of the two cited propositions, the statement is overbroad. In proceedings where the statutes embodying the rules of evidence apply, the admission of evidence is controlled by rule and not by judicial discretion, except where judicial discretion is a factor involved in assessing admissibility. *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991).

Having said that, we move on to Schwartz' reliance on the fact that the clerk was not qualified as a handwriting expert. Neb. Rev. Stat. § 27-901 (Reissue 1989) makes clear that one need not be a handwriting expert in order to authenticate a writing:

> (1) The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (2) By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> . . . .
>
> (b) *Nonexpert opinion* as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(Emphasis supplied.)

The clerk testified that during the course of her employment at the motel, which began in February 1989, she had occasion to see the handwritten initials of other front desk employees. Upon examination of the register tapes, the clerk identified the initials of three separate individuals, as well as her own. Thus, because the clerk demonstrated a familiarity with handwriting not acquired for purposes of the case, the strictures of § 27-901

were complied with.

Schwartz has made no showing of noncompliance with § 27-901 in his further complaints about the register tapes, wherein he claims that the handwriting consisted only of initials, that the reported authors of the initials were not called to testify, and that the cash amounts reflected on the tapes were not shown to match the amount taken in the robbery. Those complaints, at most, go to the weight to be accorded the clerk's handwriting testimony, not to the admissibility of the testimony.

Schwartz also urges that it was error to receive into evidence $838 in cash, to which were attached the aforementioned register tapes, all found in the pickup truck in which Schwartz was arrested. He claims that because the clerk did not identify the money as that taken in the robbery, there were no distinguishing marks on the money or serial numbers recorded, and the amount of money found in the pickup truck did not match exactly that amount reported as stolen by the bookkeeper, more foundational evidence was required.

Neb. Rev. Stat. § 27-402 (Reissue 1989) provides:

> All relevant evidence is admissible except as otherwise provided by the Constitution of the United States or the State of Nebraska, by Act of Congress or of the Legislature of the State of Nebraska, by these rules, or by other rules adopted by the Supreme Court of Nebraska which are not in conflict with laws governing such matters. Evidence which is not relevant is not admissible.

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Rev. Stat. § 27-401 (Reissue 1989).

As already mentioned, the testimony revealed that the money in question was similar in amount to that stolen from the motel. This money was attached to register tapes identified by the clerk as being of a type taken with the money from the motel. The money and tapes were found shortly after the robbery in a vehicle matching the description of the vehicle suspected to have been used in connection with the robbery,

which vehicle was occupied by Schwartz, a man meeting the robber's description. Sufficient foundation had been laid to render the money relevant to the issue of Schwartz' guilt.

The clerk's failure to testify that the money was the same money as that taken from the motel, the lack of serial number identification, and the slight discrepancy between the amount of money recovered and that reported by the bookkeeper to have been stolen are, again, matters affecting the weight to be accorded the evidence, not its admissibility.

3. Nondirection of Verdict

Finally, in the third and last summarized assignment of error, Schwartz claims that the district court erred in overruling his motion for directed verdict following the State's rest. However, upon the overruling of his motion for directed verdict, Schwartz presented evidence in his defense.

Because it is the rule in Nebraska that a defendant who moves for a directed verdict at the close of the State's evidence and who, upon the overruling of such motion, proceeds with trial and introduces evidence waives any error in the ruling on the motion for a directed verdict, *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991), Schwartz waived any error in this regard.

Once again, however, a directed verdict of acquittal would have been improper. A directed verdict in a criminal case is appropriate only when there is a complete failure of evidence to establish an essential element of the crime charged or when the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Bright*, 238 Neb. 348, 470 N.W.2d 181 (1991); *State v. Thomas, supra*. In this court's consideration of a defendant's motion for a directed verdict, the State is entitled to have all its relevant evidence accepted as true, every controverted fact resolved in its favor, and every beneficial inference reasonably deducible from the evidence. *Id.* As the analyses of Schwartz' other claims of error demonstrate, the State proved a prima facie case, and there was thus no basis upon which the trial court could have properly directed a verdict of acquittal.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., concurs.

STATE OF NEBRASKA, APPELLEE, V. ALICE GARZA, APPELLANT.
474 N.W.2d 246

Filed September 13, 1991. No. 91-537.

1. **Verdicts: Appeal and Error.** A verdict or judgment in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict or judgment.
2. **Controlled Substances: Evidence: Circumstantial Evidence: Proof.** Constructive possession of an illegal substance may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of arrest or by a showing of dominion over the substance.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed.

Gerard A. Piccolo, Hall County Public Defender, for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Defendant was charged by information with possessing a controlled substance other than marijuana, namely, cocaine; possession of drug paraphernalia; and possession of marijuana weighing 1 ounce or less, in violation of Neb. Rev. Stat. §§ 28-416(3) and (8) and 28-441 (Reissue 1989). Following a bench trial she was found guilty on all counts and was sentenced accordingly. She appeals to this court, assigning as the sole error the sufficiency of the evidence to support her conviction on the cocaine charge.

This appeal borders on the frivolous. A verdict or judgment in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict or judgment. *State v. Tuttle*, 238 Neb. 827, 472 N.W.2d 712 (1991).

On October 12, 1990, the Grand Island police were called to a motel in that city to respond to a complaint by the female defendant that she had been assaulted by an unknown male. Upon arrival of the police, the defendant asked that the police accompany her to her room in the motel, to which she led them. Upon being invited into the room, the police discovered a white powdery substance on the nightstand, a syringe with what appeared to be fresh blood on it lying on top of some other items in a trash can, a beer can with a white powdery substance on the bottom of it, another syringe and a small plastic spoon, cigarette papers, and a clear plastic bag containing a green leafy substance.

One of the investigating police officers testified that from his observations and experience, in his opinion the defendant was under the influence of alcohol or drugs. Another police officer testified that he observed puncture marks on the arm of the defendant.

A forensic drug chemist for the Nebraska State Patrol testified that he analyzed the materials seized from the motel room claimed by the defendant to be hers, and found the substances to be cocaine and marijuana.

The defendant did not testify. No evidence other than that produced by the Grand Island police and the State Patrol was received in evidence.

Constructive possession of an illegal substance may be proved by direct or circumstantial evidence, and may be shown by the accused's proximity to the substance at the time of arrest or by a showing of dominion over the substance. *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990).

The evidence is overwhelming that defendant was guilty of the three counts charged against her. The judgment of the district court was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. $15,518 IN U.S. CURRENCY, APPELLEE, VON O. EARY, INTERESTED PARTY, APPELLANT.
474 N.W.2d 659

Filed September 20, 1991. No. 89-226.

1. **Courts: Judgments: Appeal and Error.** When the record demonstrates that the decision of the trial court is correct, although such correctness is based on different grounds from those assigned by the trial court, the Supreme Court will affirm.
2. **Jurisdiction: Standing.** Before one is entitled to invoke jurisdiction of a court, one must have standing—some real interest in the subject matter in controversy.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Steven Lefler, of Lefler & Flick, for appellant.

Robert M. Spire, Attorney General, James H. Spears, and William L. Howland for appellee State.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

In this in rem proceeding the appellant, Von O. Eary, has never claimed a recognized legal standing to challenge the forfeiture to the state of $15,518 seized pursuant to a search warrant in a drug raid of an Omaha motel room occupied by the appellant and his companion.

We affirm the order of the district court for Douglas County forfeiting the money to the state, not for the reasons stated by the trial court, but because Eary failed to claim legal standing to challenge the forfeiture. When the record demonstrates that the decision of the trial court is correct, although such correctness is based on different grounds from those assigned by the trial court, the Supreme Court will affirm. *K & K Farming v. Federal Intermediate Credit Bank*, 237 Neb. 846, 468 N.W.2d 99 (1991).

Neb. Rev. Stat. § 28-431(4) (Reissue 1989) provides in substance that when money used in illegal drug transactions is seized by law enforcement officers, the county attorney of the county in which the money is seized shall institute a forfeiture

proceeding in the district court for that county. Any person having an interest in the money which has been seized may file an answer or demurrer to the petition of the county attorney. "*The answer or demurrer shall allege the claimant's interest in or liability involving such property.*" (Emphasis supplied.) *Id.* In his answer, Eary claimed only that "he is an interested party in the proceedings *in that he was present at the location at the time of the execution of the search warrant.*" (Emphasis supplied.) Before one is entitled to invoke jurisdiction of a court, one must have standing—some real interest in the subject matter in controversy. *Rexroad, Inc. v. S.I.D. No. 66*, 222 Neb. 618, 386 N.W.2d 433 (1986). Here, Eary has only claimed an interest in the seized money as one who was present during the execution of the search warrant. Eary's failure to claim some legal or equitable interest in the money seized pursuant to a search warrant hardly amounts to "some real interest in the subject matter in controversy." See, *Rexroad, Inc. v. S.I.D. No. 66, supra*; *U.S. v. $321,470.00, U.S. Currency*, 874 F.2d 298 (5th Cir. 1989).

Appellant, having failed to claim any legal or equitable interest in the money seized pursuant to a search warrant, has not established any standing to contest the forfeiture of the $15,518 to the state.

AFFIRMED.

RUDY G. STANKO, APPELLANT, V. ROBERT CHALOUPKA ET AL., APPELLEES.

474 N.W.2d 470

Filed September 20, 1991. No. 89-466.

1. **Pretrial Procedure.** Litigants will not be permitted to impede an opponent's legitimate discovery efforts through unfounded recalcitrance.
2. **Pretrial Procedure: Rules of the Supreme Court.** An appropriate sanction under Neb. Ct. R. of Discovery 37 (rev. 1989) is to be determined in the factual context of the particular case.
3. **Pretrial Procedure: Appeal and Error.** Determination of an appropriate

sanction for failure to comply with a proper discovery order initially rests in the discretion of the trial court, and its rulings with respect thereto will not be disturbed on appeal absent a showing of an abuse of that discretion.

Appeal from the District Court for Scotts Bluff County: JOHN D. KNAPP, Judge. Affirmed.

Rudy G. Stanko, pro se.

Francis L. Winner, P.C., for appellees.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Appellant, Rudy G. Stanko, sued for damages allegedly arising from the claimed failure of appellees, Robert Chaloupka and the law office of Van Steenberg, Brower, Chaloupka, Mullin, and Holyoke, P.C., to provide him with proper legal representation. The district court dismissed the action with prejudice as a consequence of appellant's refusal to comply with its discovery orders. We affirm.

The record demonstrates that appellant has, without proper legal cause, steadfastly obstructed appellees' legitimate discovery efforts. For example, notwithstanding the fact that he was properly ordered to do so by the district court, appellant refused to produce documents relating to the damages he claims, produce documents relating to the running of the applicable period of limitations, and answer relevant interrogatories. He also refused to be deposed.

Neb. Ct. R. of Discovery 37(b)(2)(C) (rev. 1989) provides that upon the failure of a party to comply with an order to permit discovery, the court may sanction the failing party by, among other things, dismissing the action. As recently observed, the discovery process permits the exploration of all available and properly discoverable information in order that the fact issues in controversy may be narrowed to the end that the ensuing trial may be conducted efficiently and economically. In addition, the process makes adequate pretrial preparation possible, thereby providing a basis for an informed cross-examiner and informative cross-examination. The process also helps eliminate the element of surprise, a

circumstance which might lead to a result based more on legal maneuvering than on the merits of the case. *Norquay v. Union Pacific Railroad*, 225 Neb. 527, 407 N.W.2d 146 (1987). Thus, this court will not permit litigants to impede an opponent's legitimate discovery efforts through unfounded recalcitrance. As noted in *Aetna Cas. & Surety Co. v. Dickinson*, 216 Neb. 660, 345 N.W.2d 8, 9 (1984), " 'play[ing] games' " with the courts will not be tolerated. We thus affirmed the entry of default judgment against defendants for failing to comply with an order directing the production of documents.

The dismissal of a plaintiff's action for failure to comply with a proper discovery order is but the obverse of entering default judgment against a defendant who fails to comply with such an order. Thus, just as entering default judgment may be an appropriate sanction for an unjustifiably obstructionist defendant, so may the dismissal of the action be an appropriate sanction for an inexcusably recalcitrant plaintiff.

Inasmuch as the discovery rules of this jurisdiction are generally and substantially patterned after the corresponding discovery rules in the Federal Rules of Civil Procedure, *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991), federal court pronouncements concerning the federal rules of discovery provide helpful guidance with respect to the application of our discovery rules. It is therefore appropriate to note that the U.S. Court of Appeals for the Eighth Circuit approves dismissing an action because of a plaintiff's failure to comply with a proper discovery order. *Omaha Indian Tribe v. Tract I—Blackbird Bend Area*, 933 F.2d 1462 (8th Cir. 1991).

To be sure, an appropriate sanction under our rule 37 is to be determined in the factual context of the particular case, *Norquay v. Union Pacific Railroad, supra*, but it is a matter which initially rests in the discretion of the trial court, and its rulings with respect thereto will not be disturbed on appeal absent a showing of an abuse of that discretion, *Engleman v. Nebraska Public Power Dist.*, 228 Neb. 788, 424 N.W.2d 596 (1988), and *Chief Indus. v. Hamilton Cty. Bd. of Equal.*, 228 Neb. 275, 422 N.W.2d 324 (1988).

There being nothing in the record before us which demonstrates that the district court abused its discretion in

dismissing appellant's action, the judgment of dismissal is affirmed.

AFFIRMED.

WHITE, J., not participating.

ARNOLD R. EGGERS AND RUTH M. EGGERS, APPELLANTS, V. THE TILDEN BANK, A NEBRASKA BANKING CORPORATION, APPELLEE.

474 N.W.2d 472

Filed September 20, 1991. No. 89-707.

1. **Decedents' Estates: Joint Accounts: Intent.** Sums remaining on deposit at the death of a party to a joint account belong to the surviving party as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created.
2. **Actions: Joint Tenancy: Abatement, Survival, and Revival: Merger.** If joint tenants are named plaintiffs in a pending lawsuit involving property owned in joint tenancy, the death of one joint tenant does not cause that person's cause of action to abate. Instead, the decedent's cause of action is merged with that of the surviving plaintiffs.
3. **Judgments: Appeal and Error.** In an appeal of an action at law, the Supreme Court does not reweigh the evidence but, instead, considers the judgment in the light most favorable to the successful party. That party is entitled to the benefit of every inference which can reasonably be deduced from the evidence.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed in part, and in part appeal dismissed.

Vince Kirby for appellants.

Thomas E. Brogan, of Brogan & Stafford, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

In this action, the plaintiffs, Arnold R. and Ruth M. Eggers, husband and wife, sought to recover the proceeds of three certificates of deposit from the defendant, The Tilden Bank

(Bank). After a bench trial, the district court dismissed the amended petition, finding that the plaintiffs had directed the Bank to apply the proceeds of the certificates of deposit to their son and daughter-in-law's indebtedness and that plaintiffs had received full value, as to both principal and interest, for the three certificates. The plaintiffs timely appealed, contending, in summary, that the district court erred (1) in admitting parol evidence to alter or modify the terms of an unambiguous written agreement; (2) in allowing evidence offered to establish a modification of a written agreement of the parties when modification was not pleaded; and (3) in finding that Arnold Eggers directed the Bank to apply the proceeds of the certificates of deposit to the indebtedness of Duane T. and Barbara K. Eggers.

The record shows that the plaintiffs, as joint tenants with right of survivorship, owned three certificates of deposit issued by the Bank:

CD No.	Date Issued	Date Paid	Face Amount	Value at Maturity
988	7-09-81	7-11-83	$10,000	$12,677.12
803	1-19-81	7-21-83	$10,000	$13,634.67
1136	1-19-82	7-21-83	$20,000	$23,654.00

Each certificate provided that it was "[p]ayable to the depositor upon presentation and surrender of this certificate properly endorsed, on a maturity date." Arnold Eggers endorsed certificate No. 988 on July 11, 1983, and endorsed certificates Nos. 803 and 1136 on July 21, 1983.

The plaintiffs' son, Duane Eggers, and Duane's wife, Barbara Eggers, were farmers, were indebted to the Bank, and were having financial problems. The plaintiffs had provided financial assistance to Duane and Barbara prior to the transactions at issue in this case, lending them approximately $42,800 between March 21, 1980, and May 26, 1983.

The plaintiffs kept the certificates of deposit in two safe deposit boxes at the Bank. On July 11, 1983, Arnold Eggers removed certificate No. 988 from a safe deposit box, endorsed it, and the proceeds were applied to the indebtedness of Duane and Barbara. The Bank contends that Arnold Eggers orally

authorized this transaction. Bank records showed that $48.72 was applied to principal and $12,628.40 to interest on Duane and Barbara Eggers' debt on July 11, 1983. The Bank's comment sheet for this particular loan and date states: "Arnold cashed in CD# 98 [sic] $12,677.12 including accrued interest. Arnold has $20,000.00 CD maturiting [sic] 7/20/83."

Similarly, on July 21, 1983, Arnold Eggers removed certificates Nos. 803 and 1136 from a safe deposit box, endorsed the certificates, delivered them to the Bank's agricultural loan officer, Brad Wagner, and told Wagner to apply $30,000 of the proceeds ($37,228.67) to Duane Eggers' indebtedness. The Bank's records show that $30,000 was applied to Duane and Barbara's loan and the remaining $7,228.67 was deposited to the plaintiffs' checking account. This transaction is reflected on the Bank's comment sheet as follows: "Paid $82.30 Prin. & $29,917.70 Interest. Arnold cashed in CD& #803 & 1136 total amount $37,228.67 & applied $30,000.00 towards delinquent payments . . . . (Total amount paid by Arnold & Ruth thus far is $55,482.87)."

The plaintiffs continued to do business at the Bank. Approximately 4 years after Arnold Eggers endorsed the certificates, the plaintiffs demanded the return of the three certificates, or the total sum of $49,965.79. The plaintiffs testified at trial that they had not instructed the Bank to apply the proceeds of the three certificates of deposit to their son and daughter-in-law's loan.

On August 15, 1991, the Bank filed a suggestion of death, informing this court that Arnold Eggers died on July 7, 1990, while this appeal was pending. As a preliminary matter, therefore, we must determine whether Arnold Eggers' death affects the status of this appeal.

The causes of action alleged in this case did not abate upon Eggers' death. See Neb. Rev. Stat. §§ 25-1401 et seq. (Reissue 1989). The certificates of deposit at issue all designated the depositors as "Arnold Eggers or Ruth Eggers" and provided that "[i]f more than one depositor is named above, and unless specifically indicated therein to the contrary, this certificate and the deposit evidenced hereby, shall belong to said depositors as joint tenants with right of survivorship (and not as tenants in

common) . . . ." Neb. Rev. Stat. § 30-2704(a) (Reissue 1989) provides that sums remaining on deposit at the death of a party to a joint account belong to the surviving party as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. See, also, *McPherson v. Minier*, 179 Neb. 212, 137 N.W.2d 719 (1965).

When property owned in joint tenancy passes to a survivor, the property does not become part of the decedent's estate. If the joint tenants are named plaintiffs in a pending lawsuit involving the property owned in joint tenancy, the death of one joint tenant does not cause that person's cause of action to abate. Instead, the decedent's cause of action is merged with that of the surviving plaintiffs.

This point is illustrated in *Ferk v. County of Lake*, 205 Cal. App. 3d 268, 252 Cal. Rptr. 196 (1988). In that case, LeRoy and Polly Ferk filed a complaint on June 3, 1982, for injunctive relief and for damages to real property owned by the Ferks in joint tenancy. LeRoy Ferk died on May 7, 1987. The complaint was dismissed on August 11, 1987, for failure to prosecute within 5 years of filing, as required by Cal. Code of Civ. Proc. §§ 583.310 et seq. On appeal, Polly Ferk argued, in part, that the death of her husband suspended the court's jurisdiction and tolled the 5-year dismissal statute until a personal representative was appointed. The California Court of Appeal rejected this argument:

> [W]e are convinced that the trial court in this case did not lose jurisdiction . . . upon the death of LeRoy Ferk. The real property was held in joint tenancy. Upon the death of LeRoy Ferk, the property passed through right of survivorship to Polly Ferk as the surviving joint tenant. The property was never a part of LeRoy Ferk's estate. So, too, we believe the cause of action against defendants for injunctive relief and damages to that real property was a joint tenancy asset and upon the death of LeRoy, it passed to Polly. . . .
>
> . . . .
>
> Upon the death of LeRoy his entire interest in the lawsuit passed to Polly. It did not become part of his

> estate. Consequently, appointment of a personal representative to carry on the suit would have been inappropriate as the estate had no interest to pursue. Polly has always been a party to the suit and jurisdiction of the court was never suspended.

205 Cal. App. 3d at 275-76, 252 Cal. Rptr. at 199-200.

Applying *Ferk v. County of Lake, supra*, and the other authorities to the present case, we determine that this action need not be revived. Upon the death of Arnold Eggers, the certificates of deposit passed through right of survivorship to Ruth Eggers as the surviving joint tenant. The causes of action based on the certificates also passed to Ruth Eggers, and Arnold Eggers' estate does not have any interest in this litigation. Arnold Eggers' causes of action were not abated or extinguished upon his death, but merged with the separate claims of his wife, Ruth Eggers. Accordingly, this appeal is dismissed as to Arnold Eggers. See *Ferk v. County of Lake, supra*.

In her first and second assignments of error, the plaintiff contends that the certificates of deposit constituted unambiguous written agreements between the Bank and its customers and that the trial court wrongfully modified the terms of the agreements by receiving parol evidence of Arnold Eggers' oral instructions to apply the proceeds of the certificates to his son and daughter-in-law's loan. This argument is without merit. While the certificates of deposit did constitute unambiguous agreements between the Bank and the plaintiffs, the agreements contained in the certificates did not preclude Arnold or Ruth Eggers from orally instructing the Bank as to the disposition of the proceeds after "presentation and surrender of [each] certificate, properly endorsed, on a maturity date."

The only issue remaining is a fact question, that is, whether Arnold Eggers directed the Bank to apply the proceeds of the certificates of deposit to his son and daughter-in-law's debt. In an action at law, the factual findings of the trial court have the effect of a jury verdict and will not be set aside on appeal unless they are clearly wrong. In a bench trial, the judge sitting as the trier of fact is the sole judge of the credibility of the witnesses

and the weight to be given their testimony. *Brown v. Clayton Brokerage Co.*, 238 Neb. 646, 472 N.W.2d 381 (1991). On appeal, the Supreme Court does not reweigh the evidence but, instead, considers the judgment in the light most favorable to the successful party. That party is entitled to the benefit of every inference which can reasonably be deduced from the evidence. *Id.* The evidence presented by the Bank, if believed, is sufficient to support the judgment.

The judgment of the district court is affirmed as to appellant Ruth Eggers. The appeal of Arnold Eggers is dismissed.

AFFIRMED IN PART, AND IN PART APPEAL DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. LEON H. JAMESON, APPELLANT.
474 N.W.2d 475

Filed September 20, 1991. No. 90-209.

Convictions: Criminal Attempt. To sustain a conviction for the offense of criminal attempt in violation of Neb. Rev. Stat. § 28-201(1)(a) or (b) (Reissue 1989), evidence must establish beyond a reasonable doubt that the defendant intentionally engaged in conduct which (1) would constitute a particular crime, if the attendant circumstances were as the defendant believes such circumstances to be, or (2) under the circumstances as the defendant believes such circumstances to be, constitutes a substantial step in a course of conduct intended to culminate in the defendant's commission of the crime.

Appeal from the District Court for Buffalo County: DEWAYNE WOLF, Judge. Affirmed.

Gary L. Hogg, Buffalo County Public Defender, for appellant.

Robert M. Spire, Attorney General, William L. Howland, and Steven J. Moeller for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

A jury in the district court for Buffalo County convicted Leon H. Jameson of attempted first degree sexual assault, a violation of Neb. Rev. Stat. §§ 28-319(1)(a) and 28-201 (Reissue 1989). Attempted first degree sexual assault is a Class III felony, see § 28-201(4)(b), punishable by imprisonment for 1 to 20 years, a $25,000 fine, or both such imprisonment and fine, Neb. Rev. Stat. § 28-105 (Reissue 1989). The district court sentenced Jameson to imprisonment for 1 to 4 years.

Jameson assigns two errors. Jameson claims, first, that the evidence was insufficient to sustain his conviction, and, second, that the court imposed an excessive sentence. We affirm.

STANDARD OF REVIEW

> " 'In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict.' " . . .
>
> " 'On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.' "

State v. Johnson, 238 Neb. 206, 206-07, 469 N.W.2d 761, 762 (1991) (quoting *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990)). Accord, *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990); *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987); *State v. Robertson*, 223 Neb. 825, 394 N.W.2d 635 (1986).

CRIMINAL ATTEMPT

Section 28-319 provides in pertinent part:

> (1) Any person who subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception . . . is

guilty of sexual assault in the first degree.

(2) Sexual assault in the first degree is a Class II felony.

Neb. Rev. Stat. § 28-318(6) (Reissue 1989) states:

> Sexual penetration shall mean sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes. Sexual penetration shall not require emission of semen . . . .

Section 28-201 provides in part:

> (1) A person shall be guilty of an attempt to commit a crime if he:
>
> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
>
> (b) Intentionally engages in conduct which, under the circumstances as he believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his commission of the crime.
>
> . . . .
>
> (3) Conduct shall not be considered a substantial step under this section unless it is strongly corroborative of the defendant's criminal intent.
>
> (4) Criminal attempt is:
>
> . . . .
>
> (b) A Class III felony when the crime attempted is a Class II felony.

To sustain a conviction for the offense of criminal attempt in violation of § 28-201(1)(a) or (b), evidence must establish beyond a reasonable doubt that the defendant intentionally engaged in conduct which (1) would constitute a particular crime, if the attendant circumstances were as the defendant believes such circumstances to be, or (2) under the circumstances as the defendant believes such circumstances to be, constitutes a substantial step in a course of conduct intended to culminate in the defendant's commission of the crime. *State v. White,* 238 Neb. 840, 472 N.W.2d 720 (1991). See, also,

State v. Swoopes, 223 Neb. 914, 395 N.W.2d 500 (1986); *State v. Benzel*, 220 Neb. 466, 370 N.W.2d 501 (1985); *State v. Sodders*, 208 Neb. 504, 304 N.W.2d 62 (1981).

SUFFICIENCY OF THE EVIDENCE

Examining the evidence, which is construed most favorably to the State in light of Jameson's conviction, we conclude that the evidence is sufficient to sustain the conviction. In Jameson's trial, the State factually established that, in the early morning hours of the date alleged, Jameson, uninvited and unknown to the 19-year-old victim, entered the residence shared by the victim and her female roommate. Jameson went into the victim's bedroom, where she was alone and asleep, and crawled into the victim's bed. While the victim struggled, Jameson fondled the victim's breasts and ultimately placed his hand and erect penis in the victim's vaginal area, but there was no sexual penetration. Eventually, the victim freed herself from Jameson and called police, who arrived shortly afterwards, although Jameson had departed in the meantime. After the police investigated the assault, Jameson was arrested and charged with attempted sexual assault.

A jury could, and did, reasonably find that Jameson intentionally engaged in conduct which constituted a substantial step toward the commission of first degree sexual assault. Hence, the evidence is sufficient to sustain Jameson's conviction, which is affirmed.

EXCESSIVE SENTENCE

Jameson was sentenced to imprisonment for 1 to 4 years, a penalty statutorily authorized by § 28-105(1) for a Class III felony. " 'A sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed.' " *State v. Johnson, supra* at 208, 469 N.W.2d at 763 (quoting *State v. Kitt*, 232 Neb. 237, 440 N.W.2d 234 (1989)). Accord, *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991); *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990); *State v. Dillon*, 222 Neb. 131, 382 N.W.2d 353 (1986). In view of the nature of the crime and the relevant information contained in the presentence investigation report, we cannot state that the district court

abused its discretion in the sentence imposed on Jameson. For that reason, the sentence imposed on Jameson is affirmed.

AFFIRMED.

CAROL L. PETERSON, APPELLANT AND CROSS-APPELLEE, V. ROBERT G. PETERSON, APPELLEE AND CROSS-APPELLANT.

474 N.W.2d 862

Filed September 20, 1991. No. 90-281.

1. **Modification of Decree: Child Custody: Proof.** Before a court may modify a dissolution decree so as to affect custody of minor children, the party seeking the modification must show that there has been a material change of circumstances which adversely affects the best interests of the children.
2. **Modification of Decree: Words and Phrases.** In the context of marital dissolutions, a material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently.
3. **Modification of Decree: Child Custody: Proof.** The custodial parent's decision to change the nature or extent of minor children's schooling does not support a change in custody absent an affirmative showing by the party seeking the modification that the custodial parent's decision has injured or harmed, or will jeopardize, the children's physical or mental health, safety, or well-being.
4. **Constitutional Law: Parental Rights: Child Custody.** When a parent's first amendment interests may be implicated in an action concerning the custody or visitation of her or his children, the courts will not impinge upon those interests absent an immediate and substantial threat to the temporal well-being of the children.
5. **Constitutional Law.** Although the prohibition against infringement of religious belief is absolute, the immunity afforded religious practices is not so rigid.
6. **Constitutional Law: Parental Rights.** Courts have a duty to consider whether religious beliefs threaten the health and well-being of a child.
7. _____: _____. When a court finds that particular religious practices pose an immediate and substantial threat to a child's temporal well-being, a court may fashion an order aimed at protecting the child from that threat; in so doing, a court must narrowly tailor its order so as to result in the least possible intrusion upon the constitutionally protected interests of the parent.
8. **Child Support: Rules of the Supreme Court.** As a general matter, child support payments should be set according to the Nebraska Child Support Guidelines (rev. 1991) established by the Nebraska Supreme Court.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed as modified.

Richard K. Watts, of Mills, Mills & Papik, and Virginia G. Johnson, of The Nebraska Civil Liberties Union Foundation, for appellant.

Bruce E. Stephens and Christine P. Costantakos for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

This is an appeal from a modification of a dissolution decree, changing custody of the parties' three minor children from the petitioner mother, Carol L. Peterson, to the respondent father, Robert G. Peterson, and ordering the mother to abstain "from any corporal punishment of the minor children and . . . from making any comments to the minor children with regard to her religious beliefs, whatsoever, under the penalties of contempt." The mother has appealed, assigning five claims of error, which merge to assert that the district court should not have (1) changed custody of the children or (2) ordered her to refrain from the use of corporal punishment and fear to force the children's obedience to the doctrines of her religion, and to abstain from discussing her religion with the children, "when a less restrictive order would suffice." The father has cross-appealed, assigning as error the district court's failure to order the mother to pay reasonable child support. We affirm as modified.

The parties were married on October 22, 1977, and have three minor children: Sadie, born to the mother on August 15, 1974, by a prior marriage and adopted by the father in 1978; Cassie, born January 4, 1979; and William, born August 11, 1983. The marriage was dissolved on February 25, 1988.

Eight months later, on October 25, 1988, the father filed an application to modify the provisions of the decree relating to the custody of the children, which application he made more definite and certain on December 2, 1988. On its own motion, the district court appointed a guardian ad litem to represent Sadie.

At the time the marriage was dissolved, the children were

attending public school in York. In October 1988, the mother enrolled the children in the York Christian Academy, which is affiliated with Good Life Pentecostal Church, the church she attends.

The academy is not accredited by the State of Nebraska and employs "monitors" instead of teachers. The monitors must complete a 1-week training course to qualify for their position and are available to answer the students' questions. The students are given workbooks, which they complete at their own pace. The schoolday at the academy begins at 8:30 a.m. From 8:30 until noon, the children work on their lessons. After a 1-hour lunch break, the children go to a nearby park to play until 2:45 p.m., unless the weather is inclement, in which case they play indoors. At 3 p.m., the children are dismissed for the day.

The guardian ad litem, who observed the academy in operation and interviewed its administrator and some of the monitors, concluded that the monitors are "not terribly actively involved on a regular basis with actually providing instruction." The monitors informed the guardian ad litem that they had not graduated from an accredited high school, but had gone through the program offered at the academy (referred to as "paces," or "ACE," in the record) and received their general equivalency diplomas. One of the monitors was taking "college level paces" at the academy, using the same method. When asked about the educational qualifications of the monitors, the mother responded that the "educational qualifications of these monitors is not pertinent to the school we run. It does not require qualified teachers under Chapter 13, we do not have to have qualified teachers." By chapter 13, the mother appears to have meant rule 13 of the State Department of Education, the exception from state accreditation under which the academy apparently operates. The mother suggests prayer for divine guidance if the monitors and the materials provided cannot help a student solve a problem.

The guardian ad litem's main concern was the method of instruction utilized by the academy. Although he had some difficulty articulating his apprehension, it appears to be that the program of the academy does not lend itself to the development

of analytical skills or independent thought—that the focus is on giving the correct answer rather than developing the methodology or thought processes by which an answer is reached. This perturbation was confirmed when Cassie, who in February 1989 had stopped living with the mother and moved in with the father, returned to the public school. (Apparently, the mother had given Cassie the option of staying with her and attending the academy or living with the father and attending the public school.) Both the principal and one of Cassie's teachers at the public school testified that upon her return, Cassie had difficulty with mathematical comprehension. The teacher seemed to believe Cassie was relying on rote memorization.

In early 1989, Cassie was expelled from the academy. According to Cassie, this was because she did not have a "really Christian attitude, and . . . was picking . . . crayons up during prayer." According to the mother, Cassie was expelled because she was a disciplinary problem. When she was expelled, the mother met Cassie at the school, took her home, and beat her with a leather belt for approximately 2 minutes. Cassie received at least 10 lashes. The mother then had her copy the definitions of "stubbornness" and "rebellion" from the dictionary, along with scriptural passages referring to rebelliousness as "a sin of witchcraft and stubbornness as an abomination unto the Lord."

When Cassie finished, the mother examined her work and found 20 errors in spelling and punctuation. Cassie was struck once with the belt for each of these scrivener's errors. After receiving 20 lashes, Cassie was required to recopy the material. This time, the mother found 10 mistakes, and Cassie was given another 10 lashes. On her third attempt at copying the material, Cassie made three mistakes and so was given three lashes with the belt. When the mother made Cassie copy the material for a fourth time, Cassie was able to do so without error. All told, Cassie was struck at least 43 times during this incident, which lasted about 4 1/2 hours. The mother then took Cassie to a fast-food restaurant for a treat, after which they drove around and discussed the incident.

It is worth noting that Cassie received the 43 lashes during a

period when the mother considered herself to be "very leery to spank" Cassie and "very lax" in her discipline because she was involved in a "custody suit." She testified that she believed she overlooked "a lot of things that maybe need to be punished" and that she was "probably not as consistent as [she] should be. There's probably a lot of things that get let by."

The mother does not seem to think that her actions were excessive. She felt that she "did the best that [she] could do at the time that [she] knew how to do" and did not know whether she would react the same way again. Her attitude was further evinced during her pro se cross-examination of Cassie, where the following exchange took place:

> Q [by the mother] Did you feel that the punishment that was administered to you, was unfair?
>
> A I told you that, but I didn't really feel that.
>
> Q How many times have you told me that you didn't feel that punishment was unfair?
>
> A Zero.
>
> Q What?
>
> A Zero.
>
> Q You have never told me that you didn't feel that punishment was unfair?
>
> A Yes.
>
> Q What?
>
> A Yes.
>
> Q Yes, you have told me, or no, you haven't?
>
> A No, I haven't.

The mother testified further that she usually gives the children "five to 10" lashes with the belt. Cassie testified that during a 1-week visit with her mother, she saw the mother give her brother six lashes with the belt "[a]bout every day." There was testimony that William told his father that in order for him, William, "to learn to be good, he had to be spanked and he had to be spanked real hard." Sadie testified that her parents spanked the children before the divorce and that when they lived in Kansas, they possessed a spanking paddle and stick, but she could only recall one instance in which the father used either of these implements on any of the children.

There was testimony that the mother is disinclined to seek or

follow medical advice. Cassie testified that the mother "doesn't believe in medicine." On one occasion, when William was sick with a 103-degree fever, the father made a doctor's appointment for the child. Although the mother took the parties' son to the doctor, she decided not to give him the medication which the doctor had prescribed. It also appears that the mother felt it was unnecessary for William to receive immunizations because "God will provide for the children." However, by the time of trial William's immunizations were current.

The mother has two jobs. She helps a disabled man, Winsor Tucker, from 3:30 to 6:30 p.m. on Mondays, Thursdays, Fridays, and Saturdays. On Tuesdays, she works at a cafe from 6:30 to 8:30 a.m., at which time she returns home to take the children to school. After taking the children to school, the mother returns to the cafe and works until 4:30 or 5 p.m. She then takes leftovers from the cafe to her children for their supper and goes to prepare supper for Tucker. On Wednesdays, she works for Tucker from 1 to 6:30 p.m. She also performs volunteer work at her church's day-care center, often opening the center at 6:30 a.m. There was testimony that the mother goes to bed at 9 p.m.

While the mother is working for Tucker, the children are left home alone. The mother testified that Sadie cooks for the other children on the nights the mother cooks for Tucker, which is usually every night except Sunday. The father testified that Sadie has "had to more or less raise" William since the dissolution and that Sadie appeared to be the primary caregiver for the other children while they were living with the mother. This testimony was reinforced by a clinical social worker called as a witness by the father, who described Sadie as "a very good mother."

Some witnesses testified that since the dissolution, the children's personal hygiene and grooming have deteriorated; other witnesses testified that the children had lost weight.

The clinical social worker spent 4 years as director of Operation Concern, "a support group designed to aid families and former cult members while going through crisis." She also attended workshops and read literature available in the mental health community on the subject of cults, as well as interviewed

"a lot of people that have been parts of these groups . . . ." As part of the preparation for testifying in the case, she interviewed the mother, father, and children.

The clinical social worker testified that approximately 40 percent of the cases in which she has been professionally involved have dealt with problems arising from involvement with religious cults. She stated that she uses 10 criteria to determine whether a group is a cult. These criteria are (1) "a very strong and powerful leader that is charismatic," (2) "the group gives power to that leader and is submissive to that leader," (3) "a rigid ideology where there is definitely right and a wrong or being of God or of Satan," (4) "physiologic deprivation in the form of either sleep deprivation . . . or food deprivation" or long hours listening to lectures or sermons, (5) isolation from family, (6) isolation or restrictions on communication from society via the media, (7) a "fair amount" of the members' income being turned over to the group, (8) some form of communal living, (9) active recruiting by group members using "love bombing" (overwhelming prospective recruits with love and affection and then conditioning that affection on acceptance of the group's beliefs), and (10) hate and fear of outsiders or looking upon them as lost souls.

In this witness' view, a group which meets 7 of the 10 criteria is a cult. She became familiar with the Good Life Pentecostal Church through interviews with people who have been involved with the church, and gave her opinion that the church meets 9 of the 10 aforementioned criteria (all except communal living) and is therefore a cult.

The clinical social worker also opined that the environment and practices fostered by the church are not conducive to the social development of the parties' children and that the practices of the church, as implemented by the mother, are detrimental to the children's emotional and psychological development. In her view, both Sadie and Cassie were being subjected to "mind control," but William was not.

The record concerning the parties' earnings is sketchy; it contains no information as to the father's earnings at the time of the subject trial, but reflects that in 1988 he had gross earnings of $23,139. The record further reflects that in that year

the mother had gross earnings of $6,408.50 and that she was earning at about the same rate at the time of trial.

The record clearly demonstrates that neither the mother nor the father is endowed with much toleration for the other's religious beliefs. The father thinks the mother is a religious fanatic and her church is a cult; on the other hand, the mother believes that all religions which believe in the Trinity, including the religion the parties shared when married, are daughters of "the great whore." While the father spent a great deal of time attempting to establish that the Good Life Pentecostal Church is a cult, whatever that might mean, notwithstanding the clinical social worker's opinion, it is neither necessary nor appropriate for us to pass judgment on that question in order to resolve the issues presented by the errors assigned by either party.

The first of the mother's summarized assignments of error asserts the district court abused its discretion by changing custody of the children from her to the father.

The mother contends that the father failed to demonstrate that there was a material change in circumstances affecting the best interests of the children. The father, on the other hand, points to several developments which, he asserts, constitute such a change. These include the mother's use of objects with which to spank the children, the removal of the children from the public school and the placement of them into an unaccredited institution, the increasing absence of the mother from the home, and the deteriorating hygiene of the children.

Citing our decision in *Von Tersch v. Von Tersch*, 235 Neb. 263, 455 N.W.2d 130 (1990), the mother urges that the removal of the children from the public school and the enrollment of them in the academy cannot be considered a material change of circumstances.

In *Von Tersch*, we were asked to determine whether the district court abused its discretion by ordering the Von Tersch children to attend public school rather than the private school which the custodial parent desired they attend. We held that

> a custodial parent in a marital dissolution proceeding may determine the nature or extent of the education for a child legally affected by the dissolution proceeding unless there

> is an affirmative showing that the custodial parent's decision has injured or harmed, or will jeopardize, the child's safety, well-being, or health, whether physical or mental.

Id. at 272, 455 N.W.2d at 136. The *Von Tersch* noncustodial parent argued, as does the father here, that the children's attendance at the private school would reduce their opportunity for social interaction and that the public school, with its numerous extracurricular activities, science laboratories, sports facilities, and computers would provide greater opportunities than the custodial parent's chosen private school. In *Von Tersch*, we declined to evaluate the relative educational merits of the schools and found that the evidence did not establish that the school chosen by the custodial parent had or would have a detrimental effect on the children's safety, well-being, or health.

Von Tersch involved a noncustodial parent attempting to control his children's education without taking on the responsibilities of custody. Here, we are faced with a noncustodial parent who seeks custody in part because he wishes to exercise control over his children's education. The question thus is whether this difference has any legal significance.

Before a court may modify a dissolution decree so as to affect custody of minor children, the party seeking the modification must show that there has been a material change of circumstances which adversely affects the best interests of the children. *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991). In the context of marital dissolutions, a material change in circumstances means the occurrence of something which, had it been known to the dissolution court at the time of the initial decree, would have persuaded the court to decree differently. *McDougall v. McDougall*, 236 Neb. 873, 464 N.W.2d 189 (1991).

If the custodial parent has the right to determine the nature and extent of the education of the children in her or his custody, can such parent's decision to change the nature or extent of a child's education be considered a material change of circumstances sufficient to modify custody, absent an affirmative showing of a detrimental effect upon the child's

safety, well-being, or health? In other words, is the burden on the noncustodial parent less when that parent seeks to gain custody than when she or he wishes to control the child's education without taking on the responsibilities of custody?

Both *Von Tersch* and the case presently before us implicate the same constitutionally protected interests, and we are working under the same constraints. The rationale of *Von Tersch* which counsels against undue entanglement in the educational choices of the custodial parent is equally applicable to the present case, and the same constitutional limitations on a court's power apply. Therefore, the custodial parent's decision to change the nature or extent of minor children's schooling does not support a change in custody absent an affirmative showing by the party seeking the modification that the custodial parent's decision has injured or harmed, or will jeopardize, the child's physical or mental health, safety, or well-being.

While the record in this case raises concerns about the quality of education provided by the academy, it does not affirmatively show that the children's continued enrollment therein poses a danger to their safety. Therefore, the removal of the children from the public school and their placement in the academy is not, in and of itself, a sufficient basis for changing custody.

The same, however, cannot be said of the father's remaining concerns, that is, the mother's frequent recourse to excessive corporal punishment, her increasing absence from the children, and the children's deteriorating condition.

The mother asserts that her use of corporal punishment cannot constitute a change in circumstances because both parties spanked the children prior to the dissolution. However, the testimony indicates but one incident where a child was struck by the father with an object prior to the dissolution.

It is the severity of the punishment inflicted in relation to the transgression occasioning it that concerns us. Particularly troubling is the mother's failure to recognize the impropriety of her excessive "discipline," raising the very real concern that she will again resort to such abuse in the future.

The mother appears to spend little time with her children, and the burden and responsibility of caring for the other

children has fallen upon the 15-year-old daughter. Although the mother is absent from the children because of her job looking after Tucker and ought not, and cannot, be deprived of the custody of her children for trying to support them, it is the best interests of the children which is our paramount concern. See *LeDoux v. LeDoux*, 234 Neb. 479, 452 N.W.2d 1 (1990).

In agreeing to the academy's "Statement on Discipline," the mother appears to have given the academy carte blanche in using corporal punishment to discipline the children, giving it complete discretion on such use, accepting the staff's judgment in matters of discipline, and not supporting any criticism the children may have of the academy. Giving so much free rein to the staff of the academy and entrusting so much of the children's care to the 15-year-old daughter indicate at least a partial abdication of parental responsibility. This is not to say that sending a child off to day care while the parent works is somehow a shirking of parental responsibilities; in these days of single parents struggling to support their families, such things are inevitable. Our concerns are, first, with the fact that so much of the caregiving responsibilities is falling upon the 15-year-old and, second, with the mother's unconditional agreement to accept whatever discipline decisions the staff of the academy might make.

The children's loss of weight and deteriorated hygiene and grooming are also legitimate sources of concern.

We can only conclude that had the dissolution court known that the mother would give one of her children over 40 lashings with a leather belt because of the child's attitude and her shortcomings as a copyist, subject another to near daily beatings, subject the younger children to the primary care of the 15-year-old, and permit a deterioration in their general condition, the original dissolution decree would not have given custody to the mother. These facts are more than sufficient to show a material change in circumstances adversely affecting the best interests of the minor children, and support a change in custody.

One last question remains concerning this summarized assignment of error: Does the fact that the mother justifies her use of corporal punishment by reference to her religious beliefs

affect our determination? When a parent's first amendment interests may be implicated in an action concerning the custody or visitation of her or his children, the courts will not impinge upon those interests absent an immediate and substantial threat to the temporal well-being of the children. *LeDoux v. LeDoux, supra.*

Clearly, the mother's excessive use of corporal punishment poses an immediate and substantial threat to the temporal well-being of her children; thus, even if the mother's first amendment rights are implicated, the facts nonetheless support a change of custody. Because of this determination, we need not reach the mother's claim that the district court erred in finding that her religious beliefs have caused a deficiency or incapacity which prevents her from performing reasonable parental duties. It is, however, appropriate to recall that although "the prohibition against infringement of religious belief is absolute, the immunity afforded religious practices by the first amendment is not so rigid." *LeDoux v. LeDoux, supra* at 485, 452 N.W.2d at 5. Insofar as the district court found that the mother's religious beliefs, rather than her particular practices, created a deficiency or incapacity in her ability to perform reasonable parental obligations, the district court abused its discretion.

In the second and last of her summarized assignments of error, the mother challenges the district court's order directing her to refrain from the use of corporal punishment and fear as a means to force the children's obedience to the doctrines of her religion, and to abstain from discussing her religion with them.

In its decree of modification, the district court made the following findings and comments:

> Since the entry of the decree herein, the [mother] has adopted systems of corporal punishment and fear to force obedience and submission of her children to the doctrine of her church.
>
> Generally, Courts preserve an attitude of impartiality between religions and will not disqualify a parent because of his or her religious beliefs. However, when such beliefs threaten the health and wellbeing [sic] of children, then the courts have a duty to act to remove children from such

abuse.

. . . .

If she were allowed to continue her practice of corporal punishment and fear onto these children, it is obvious that such acts would have not only a deleterious affect [sic] upon the relationships between the [father] and the children, but also upon the physical and mental wellbeing [sic] of the children themselves.

The district court's concerns in this matter were clarified at the hearing on the mother's motion for new trial, during which the court made the following observations:

> And, I agree with you, when you say, that that's a fundamental right that people have with regard to schooling their children in religion. But, when that schooling or that indoctrination or that kind of commentary installs or instills fear in these children, then I don't think that is a constitutionally protected parental right.
>
> And, at some point in time, the courts have the duty to step in, as I said, in this case here. No — No right is absolute. And, I don't believe that the First Amendment guarantees to any of us, the right to step in and create fear in another human being. It seems to me that's what this evidence indicated that [the mother] was doing by her threats and her comments to these children with regard to their salvation of their souls, if you will.
>
> I detected a — a real fear on the part of these children as they testified. And it seems to me that we have no constitutional right to install [sic] that kind of fear, whether it be under the guise of religion or under the guise of torture or anything else, in any child. And so, that's why I said what I did in the opinion and I don't think that it does violate any fundamental due process right. Because the right to expression and freedom of religion, I don't think, is that absolute, nor is it that broad.

The mother argues that the evidence does not support the district court's finding that her use of "corporal punishment and fear" was for the purpose of "forc[ing] obedience and submission of her children to the doctrine of her church."

Because we have determined that the evidence supports a change in custody, the challenged finding is relevant only so far as it supports that part of the district court's order forbidding the mother "from making any comments to the minor children with regard to her religious beliefs, whatsoever, under the penalties of contempt."

> Courts have a duty to consider whether religious beliefs threaten the health and well-being of a child. [Citations omitted.] Thus, when a court finds that particular religious practices pose an immediate and substantial threat to a child's temporal well-being, a court may fashion an order aimed at protecting the child from that threat. [Citations omitted.] In so doing, a court must narrowly tailor its order so as to result in the least possible intrusion upon the constitutionally protected interests of the parent.

LeDoux v. LeDoux, 234 Neb. 479, 485-86, 452 N.W.2d 1, 5 (1990).

Our first inquiry, therefore, is whether there are particular religious practices of the mother which pose an immediate and substantial threat to the children's well-being. In *LeDoux*, we held that the district court did not abuse its discretion when it ordered a noncustodial parent not to " 'expose or permit himself or any other person to expose the minor children of the parties to any religious practices or teachings that are inconsistent with the religious teachings espoused by the [custodial parent] . . . .' " *Id.* at 485, 452 N.W.2d at 4. We found that there was ample evidence that one of the minor children was experiencing serious stress which posed an immediate and substantial threat to his well-being and that this stress was due in part to the child's involuntary exposure to the disparate religions of his parents.

The testimony in the case before us is that the children were afraid that the father and other relatives were consigned to perdition and that the father follows the devil, or has the devil in him or living in his house. At least one of the children is afraid to even enter the father's church because she has been taught that it is a daughter of "the great whore." Clearly, the father's abilities to perform his duties as a custodial parent and to

provide for his children's religious training will be undermined, with corresponding harm to the children, if the mother is permitted to foster and maintain such fears in the children. They can be expected to become insecure and malfunctioning adults who lack confidence in themselves.

There was also testimony that the father feels that certain behavior and activities apparently forbidden or discouraged by the mother's church are appropriate for his children. These include permitting the children to watch television, participate in school sports, and dress in a contemporary manner. While these may seem minor concerns, there was testimony that the conflicting messages the children were receiving from their parents regarding what constitutes appropriate or sinful behavior was causing great distress and confusion for the children. Indeed, Cassie was convinced that she was evil and doomed to everlasting damnation because she cut her hair and wore pants and earrings after moving back with her father.

Equally important are the observations of the trial judge, who witnessed the testimony of the two elder children and watched their interaction with the mother as she examined them. The trial judge felt compelled to remark on the degree of fear he saw in these children. This is a thing which we cannot fully appreciate from our review of the cold record; however, the following description given by the clinical social worker is illuminating:

> Q What, if anything, did you observe from Cassie's behavior on the stand last Friday?
>
> A Cassie — Cassie's anxiety to me was very apparent. She rung [sic] her hands, she cried, she took her scarf on and off. And then when she started — when the pressure became more and more difficulty [sic] about her belief system and in what — I mean it was the essence of what she's struggling with. She is really trying to decide whether or not she's evil. Whether or not that she's following Satan instead of God. And when that became more and more pointed in — and [the mother] started asking her more and more questions about, you know, shouldn't children be frightened, shouldn't children be scared of going to hell, she put her scarf that she had on over her face and to

> me it was a very poignant and very concrete way that I think that she dealt with life as a whole. If it got too tough, if the questions got too difficult, you just cover up. And so she did that. She put the scarf all over her face and you couldn't see her, she wiped her tears away and then put it down and put it back up again and I think that's kind of what she's done emotionally. You put the scarf over all of you. And you don't let much in and you don't let much out and then you can kind of go. And I think that her pain was — was evident.

The mother apparently concedes the validity of the district court's concerns regarding her use of corporal punishment and her comments concerning the moral worth of those who are not members of her congregation, stating: "Such corporal punishment and such direct comments about persons who were not members of the church, can be considered as harmful to the children." Brief for appellant at 14.

In light of the foregoing, it was not an abuse of discretion for the district court to impose reasonable restrictions on the mother's religious discussions with the minor children. However, the restriction that she abstain from making any comments to the children with regard to her religious beliefs is broader than is presently needed to protect the children. We thus modify that portion of the district court's decree to provide that the mother abstain from making any comment to the children which in any way contradicts, disparages, or questions the validity of the father's religion or of those with whom he or the children associate, or which in any way interferes with the children's relationship with the father.

We thus turn our attention to the father's cross-appeal—which claims that the district court abused its discretion by failing to require the mother to pay child support—commenting that in view of the mother's failure to file a brief in response to his cross-appeal, his suggested total amount of $140 per month for the three children is reasonable.

Neb. Rev. Stat. § 42-364.16 (Reissue 1988) reads:

> The Supreme Court shall provide by court rule, as a rebuttable presumption, guidelines for the establishment of all child support obligations. Child support shall be

established in accordance with such guidelines unless the court finds that one or both parties have produced sufficient evidence to rebut the presumption that the application of the guidelines will result in a fair and equitable child support order.

Knippelmier v. Knippelmier, 238 Neb. 428, 470 N.W.2d 798 (1991), advises that as a general matter, child support payments should be set according to the Nebraska Child Support Guidelines (rev. 1991) established by this court.

The guidelines compute the presumptive share of each parent's child support obligation on the basis of the "[t]otal [m]onthly [i]ncome," which is defined as the "income of both [parents] derived from all sources," except for that derived from certain designated sources not involved in this case, less, so far as relevant to our inquiry, tax and Social Security insurance payments.

Thus computed, the mother's annual income is $6,032.50 and the father's $18,593, making the total monthly income $2,052.13. The guidelines provide that out of such a total monthly income, $759 per month be allocated to the support of the parties' three children, of which sum the mother is to presumptively contribute 24.5 percent, or $185.96, and the father 75.5 percent, or $573.05. However, inasmuch as the father has asked that the mother contribute but $140 per month, we direct that the mother be required to pay the father the sum of $46.67 per month per child for the use and benefit of the parties' children.

We therefore affirm the decree of the district court as modified by this opinion.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL S. NOWICKI, APPELLANT.

474 N.W.2d 478

Filed September 20, 1991. No. 90-680.

1. **Courts: Appeal and Error.** The Supreme Court, in reviewing decisions of the district court which affirmed, reversed, or modified decisions of the county court, will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the Supreme Court.
2. **Appeal and Error.** The Supreme Court always reserves the right to correct error unassigned or uncomplained of but which is plainly evident from the record and prejudicially affects a litigant's substantial right, and which if left uncorrected would result in a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process, regardless of whether the error was raised at trial or on appeal.
3. **Trial: Waiver.** A party who fails to insist upon a ruling to a proferred objection waives that objection.
4. **Trial: Evidence: Waiver.** If when inadmissible evidence is offered, the party against whom such evidence is offered consents to its introduction, or fails to object or to insist upon a ruling on an objection to the introduction of the evidence, and otherwise fails to raise the question as to its admissibility, he or she is considered to have waived whatever objection he or she may have had thereto, and the evidence is in the record for consideration the same as other evidence.
5. **Prior Convictions: Collateral Attack.** A defendant generally is not permitted to relitigate a former conviction in an enhancement proceeding, and to that extent, such conviction cannot be collaterally attacked.
6. **Prior Convictions: Collateral Attack: Right to Counsel: Appeal and Error.** Objections challenging the validity of a prior conviction offered for the purpose of sentence enhancement, beyond the issue of whether the defendant had counsel or waived the right to counsel, constitute a collateral attack on the judgment. Such objections must be raised either by direct appeal from the prior conviction or in a separate proceeding commenced expressly for the purpose of setting aside the judgment alleged to be invalid.
7. **Prior Convictions: Proof.** The burden remains with the State to prove a prior conviction in an enhancement proceeding. This cannot be done by proving a judgment which would have been invalid to support a sentence of imprisonment in the first instance.
8. **Right to Counsel: Records: Presumptions.** Where a record is silent as to a defendant's opportunity for counsel, the court may not presume such rights were respected.
9. **Prior Convictions: Records: Right to Counsel: Waiver: Collateral Attack.** A defendant's objection to the introduction of a transcript of conviction which fails to show on its face that counsel was afforded or the right waived does not constitute a collateral attack on the former judgment.
10. **Prior Convictions: Records: Right to Counsel: Waiver: Proof.** A defendant may object to the admission of the record of a prior conviction on the basis that the

record does not affirmatively establish that the defendant was represented by counsel or waived the right to counsel, and a transcript of judgment which does not contain such an affirmative showing is not admissible and cannot be used to prove a prior conviction.

11. **Constitutional Law: Pleas: Records: Right to Counsel: Waiver.** A verbatim transcript of the rendition of a guilty plea is not constitutionally required, nor does absence of such a transcript require a finding that the plea was invalid. A checklist or other docket entry which is sufficiently complete and specific may be used to establish a valid waiver of counsel.
12. **Constitutional Law: Records.** An original docket entry can be amended by a supplemental transcript to show that the original arraignment complied with constitutional requirements.
13. **Records: Right to Counsel: Waiver.** A docket entry which shows an advisement of the right to and the waiver of counsel at a sentencing hearing does not demonstrate that a defendant waived that right at the arraignment and trial.
14. **Records: Right to Counsel: Waiver: Presumptions.** Presuming the waiver of counsel from a silent record is impermissible.
15. **Records.** A checklist which is used as a substitute for a formal, written journal entry must be prepared with as much care and certainty as any record of a court in order to impart absolute verity.
16. **Right to Counsel: Waiver.** A knowing and intelligent waiver generally may not be inferred if a defendant appears pro se at trial after having been informed of his or her right to counsel.
17. **Prior Convictions: Evidence: Right to Counsel: Waiver: Proof.** When evidence, in whatever form, of a prior conviction is offered which is silent as to the representation of the defendant by counsel, the State must first lay a foundation for its admission by evidence tending to show that the defendant was, in fact, represented by counsel or that he or she had knowingly and intelligently waived that right.

Appeal from the District Court for Douglas County, JOHN E. CLARK, Judge, on appeal thereto from the County Court for Douglas County, WALTER H. CROPPER, Judge. Judgment of District Court reversed, and cause remanded with directions.

Brent M. Bloom for appellant.

Robert M. Spire, Attorney General, and Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Defendant, Michael S. Nowicki, appeals from the district court for Douglas County, which affirmed a county court

conviction of Nowicki for third-offense driving while intoxicated. We reverse and remand with directions.

In exchange for other charges' being dismissed, defendant, on May 16, 1990, pleaded no contest in the county court for Douglas County to operating a motor vehicle while under the influence of alcoholic liquor. The county court found Nowicki guilty and held an enhancement hearing at which two prior convictions of driving while intoxicated were introduced.

Defendant's counsel objected to a conviction dating from 1987 on the grounds that there was no checkmark on the docket entry indicating that defendant was actually found guilty. The court noted that Nowicki had been represented by counsel at the time of the sentencing and concluded that the conviction was valid.

A second conviction, dating from 1985, was also introduced at the enhancement hearing. Defendant's counsel objected to the conviction on the basis that there was no indication on the docket entry that defendant waived his right to counsel, that an indigency hearing was held, or that a public defender was appointed.

The court did not expressly state that an exhibit containing the 1985 and 1987 convictions was received into evidence. Nowicki's counsel, however, did not request a ruling on either objection. It is clear from the record that the two prior convictions were considered by the county court in imposing a sentence for operating a motor vehicle under the influence of alcoholic liquor, third offense. The county court imposed a sentence of 90 days in jail, a $500 fine, and a 15-year suspension of Nowicki's driver's license.

Defendant subsequently appealed the findings of the county court to the Douglas County District Court, which affirmed the county court's judgment.

Defendant appeals, assigning as error the action of the district court in (1) finding that the county court had received certified copies of both prior convictions into evidence; (2) affirming the ruling of the county court that Nowicki had intelligently waived his right to counsel during critical stages of the 1985 prosecution of Nowicki for drunk driving; and (3) affirming the ruling of the county court that Nowicki had

pleaded no contest to the 1985 charge knowingly, voluntarily, and intelligently.

Defendant contends that the district court erred in finding that the county court had received certified copies of both prior convictions into evidence. Defendant claims that as a result, those convictions should not have been considered by the county court to convict defendant of third-offense driving while intoxicated. However, this issue has not properly been preserved for appeal, since the defendant failed to assign it as error to the district court.

This court adopted the following rule of practice in *State v. Erlewine*, 234 Neb. 855, 857, 452 N.W.2d 764, 767 (1990):

> The Supreme Court, in reviewing decisions of the district court which affirmed, reversed, or modified decisions of the county court, will consider only those errors specifically assigned in the appeal to the district court and again assigned as error in the appeal to the Supreme Court. This rule shall be effective so as to apply to all county court decisions appealed to the district court after the filing date of this opinion.

Erlewine was filed on March 23, 1990. Nowicki filed his notice of appeal to the district court on May 16, 1990, and is therefore subject to our ruling in *Erlewine*. On June 27, 1990, Nowicki filed a notice of errors on appeal. In the notice, Nowicki assigned only the following error: "Specifically, Defendant avers that one of the previous convictions was insufficient to constitute a valid prior offense for enhancement purposes." Since Nowicki did not assign as error the failure of the county court to admit the exhibits into evidence, this court will not review this issue absent a finding of plain error.

The Supreme Court always reserves the right to correct error unassigned or uncomplained of but which is plainly evident from the record and prejudicially affects a litigant's substantial right, and which if left uncorrected would result in a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process, regardless of whether the error was raised at trial or on appeal. *State v. Thomas*, 229 Neb. 635, 428 N.W.2d 221 (1988). We conclude that no plain error has been committed in this case.

This court has held that a party who fails to insist upon a ruling to a proffered objection waives that objection. *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991); *State v. McClanahan*, 194 Neb. 261, 231 N.W.2d 351 (1975); *In re Estate of Kaiser*, 150 Neb. 295, 34 N.W.2d 366 (1948). We held in *Fellman* that although the defendant was entitled to a ruling, he should have made a request for such. By failing to do so the defendant elected instead to allow the preference of the trial court not to rule to stand unchallenged. *Fellman, supra*. In *In re Estate of Kaiser, supra* at 308, 34 N.W.2d at 374-75, we stated:

> "If when inadmissible evidence is offered the party against whom such evidence is offered consents to its introduction, or fails to object, *or to insist upon a ruling on an objection to the introduction of the evidence*, and otherwise fails to raise the question as to its admissibility, he is considered to have waived whatever objection he may have had thereto, *and the evidence is in the record for consideration the same as other evidence*."

(Emphasis supplied.)

Nowicki was entitled to rulings on both of the objections. Since no request was made for the rulings, Nowicki waived his objections. As a result the exhibits containing the two prior convictions were received into evidence.

The failure of the county court judge to utter the words "the exhibits are received" does not result in a miscarriage of justice and therefore does not amount to plain error. It is the duty of the lawyer to see that the exhibits are received in evidence.

Next, defendant assigns as error the use of the 1985 conviction for enhancement purposes. There is no challenge on appeal to the validity of the 1987 conviction.

In *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983), this court held that a defendant should not be permitted to relitigate a former conviction in an enhancement proceeding, and to that extent, such conviction cannot be collaterally attacked. Objections challenging the validity of a prior conviction offered for the purpose of sentence enhancement, beyond the issue of whether the defendant had counsel or waived the right to counsel, constitute a collateral attack on the judgment. *State v. McSwine*, 231 Neb. 886, 438 N.W.2d 778 (1989); *State v.*

Oliver, 230 Neb. 864, 434 N.W.2d 293 (1989); *State v. Davis*, 224 Neb. 518, 398 N.W.2d 729 (1987). Such objections must be raised either by direct appeal from the prior conviction or in a separate proceeding commenced expressly for the purpose of setting aside the judgment alleged to be invalid. *McSwine, supra*; *Oliver, supra*; *Davis, supra*.

The issue of whether Nowicki entered his plea in the 1985 conviction knowingly, voluntarily, and intelligently constitutes a collateral attack on the prior conviction and is therefore not properly before this court. See, *Davis, supra*; *State v. Slezak*, 226 Neb. 404, 411 N.W.2d 632 (1987). We therefore limit our examination to Nowicki's second assignment of error, namely, that the record of the 1985 conviction does not affirmatively establish that Nowicki waived his right to counsel.

In *Smith, supra* at 449, 329 N.W.2d at 566, this court stated:

> [T]he burden remains with the State to prove the prior convictions. This cannot be done by proving a judgment which would have been invalid to support a sentence of imprisonment in the first instance. *Baldasar v. Illinois*, [446 U.S. 222, 100 S. Ct. 1585, 64 L. Ed. 2d 169 (1980)]. Where a record is silent as to a defendant's opportunity for counsel, we may not presume such rights were respected. *Burgett v. Texas*, [389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967)]; *State v. Tweedy*, [209 Neb. 649, 309 N.W.2d 94 (1981)]. A defendant's objection to the introduction of a transcript of conviction which fails to show on its face that counsel was afforded or the right waived does not constitute a collateral attack on the former judgment.

To prove a prior conviction for enhancement purposes, the State need only show that at the time of the prior conviction, the defendant had counsel or knowingly, voluntarily, and intelligently waived the right to counsel. *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991); *State v. Vanderkuur*, 235 Neb. 566, 456 N.W.2d 473 (1990); *State v. Anderson*, 232 Neb. 349, 440 N.W.2d 257 (1989); *State v. Trammell*, 231 Neb. 137, 435 N.W.2d 197 (1989); *State v. Oliver*, *supra*; *State v. Slezak*, 226 Neb. 404, 411 N.W.2d 632 (1987). See *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). A defendant may object to the admission of the record of the

prior conviction on the basis that the record does not affirmatively establish that the defendant was represented by counsel or waived his right to counsel. *State v. Sherrod*, 229 Neb. 128, 425 N.W.2d 616 (1988); *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984). A transcript of judgment which does not contain such an affirmative showing is not admissible and cannot be used to prove a prior conviction. *Sherrod, supra*; *Ziemba, supra*.

Although the admissibility of the transcript of the 1985 judgment has been waived under the rule of *In re Estate of Kaiser*, 150 Neb. 295, 34 N.W.2d 366 (1948), we must consider the sufficiency of the evidence to support the 1985 conviction for enhancement purposes.

The exhibit for Nowicki's 1985 conviction consists of a complaint, four checklist-type docket entries, and an order of probation. This court has previously held that a checklist docket entry is sufficient to establish that a defendant has been advised of his rights and has waived them.

> [A] verbatim transcript of the rendition of a guilty plea is not constitutionally required, nor does absence of such a transcript require a finding that the plea was invalid. A checklist or other docket entry which is sufficiently complete to comply with the requirements of *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983), and the requirements previously set out in this opinion can establish a valid waiver. A checklist or other such docket entry which is made by one authorized to make it imports verity, and unless contradicted it stands as a true record of the event.

Ziemba, supra at 628, 346 N.W.2d at 218. See, *Green, supra*; *State v. Blue*, 223 Neb. 379, 391 N.W.2d 102 (1986).

The complaint was made on January 4, 1985, and contains an allegation that defendant operated a motor vehicle while under the influence of alcohol. The first docket entry shows that the defendant was arraigned on January 7, 1985, in the municipal court of the city of Omaha. The docket entry indicates that the defendant appeared without counsel and pleaded not guilty. The court adjudged defendant to be not

indigent. The checklist docket entry demonstrates further that Nowicki was advised of the charge against him and the penalties for such charge. He was also advised of his privilege against self-incrimination, his right to confront his accusers, his right to a jury trial, and his right to counsel. This checklist was of the kind approved in *Ziemba, supra*, as to form. However, it did not comply with *State v. Tweedy*, 209 Neb. 649, 309 N.W.2d 94 (1981), *State v. Walker*, 235 Neb. 85, 453 N.W.2d 482 (1990), or *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986), since the space provided in the checklist for waiver of counsel is left blank. With reference to the acceptance of a guilty or no contest plea, the court must inform the defendant concerning the right to assistance of counsel. *State v. Walker, supra*; *State v. Irish, supra*.

The second checklist shows a trial hearing held on February 22, 1985, at which the defendant appeared, again without counsel. The second checklist is almost identical to the first checklist. The defendant was advised of the same rights, and the box in front of waiver of counsel is left blank. Furthermore, the docket entry indicates that the defendant entered a plea of no contest.

The third checklist demonstrates that the defendant failed to appear at the sentencing hearing on April 18, 1985. Defendant apparently arrived late because the fourth checklist shows that a sentencing hearing was held on April 18, 1985. Defendant again did not appear with counsel. According to the checklist, the defendant was advised of his right to counsel, and this time there is a checkmark that indicates that defendant waived his right to counsel. The judge also added to the docket entry in handwriting that "defendant was previously advised of his right to counsel."

This court has held that an original docket entry can be amended by a supplemental transcript to show that the original arraignment complied with the constitutional requirements set out by this court. See *State v. Blue, supra*. In *Blue*, this court found that the original docket entry did not satisfy the requirements of *State v. Tweedy, supra*, *State v. Predmore*, 220 Neb. 336, 370 N.W.2d 99 (1985), and *State v. Ziemba*, 216 Neb. 612, 346 N.W.2d 208 (1984). The docket entry in *Blue* originally

stated, " '[D]efendant freely, voluntarily, knowingly, intelligently, and understandingly entered her plea of NOLO CONTENDERE to the charge contained in the AMENDED Information and thereupon was found and adjudged by the Court to be guilty as charged.' " *Blue, supra* at 382, 391 N.W.2d at 105. We noted that the docket entry failed to show that the defendant was informed of the nature of the charges against her, the right to counsel, the right to confront witnesses against her, the right to a jury trial, and the privilege against self-incrimination. The docket entry also did not mention whether the defendant was advised of the penalties which might be imposed upon conviction. *Blue, supra.*

The State in *Blue* submitted a supplemental transcript which showed that the trial court later entered a nunc pro tunc order amending and expanding the original docket entry to show that the original arraignment complied with all constitutional requirements and satisfied the standards set forth in *Tweedy*, *Predmore*, and *Ziemba.*

In the case at bar, the first two checklist docket entries do not meet the requirements set out by this court in *State v. Smith*, 213 Neb. 446, 329 N.W.2d 564 (1983), *Predmore*, and *Ziemba.* The only lacking element is a checkmark indicating that Nowicki waived his right to counsel. The fourth docket entry cannot be used as a supplement. That docket entry indicates that Nowicki was advised of his right to counsel and waived this right at the sentencing hearing. However, it does not demonstrate that Nowicki *waived* his right to counsel at his arraignment and trial. The fourth docket entry could have been used as an amendment if the judge had added to his handwritten statement that "defendant also previously *waived* his right to counsel." The fact that this was not done indicates that the fourth docket entry should not be considered an amendment to the preceding docket entries. As a result we have to conclude that this exhibit is inadequate for enhancement purposes.

Presuming waiver of counsel from a silent record is impermissible. *Burgett v. Texas*, 389 U.S. 109, 88 S. Ct. 258, 19 L. Ed. 2d 319 (1967). A checklist which is used as a substitute for a formal, written journal entry must be prepared with as

much care and certainty as any record of a court in order to impart absolute verity. *State v. Foster*, 224 Neb. 267, 398 N.W.2d 101 (1986).

A knowing and intelligent waiver generally may not be inferred merely because a defendant appears pro se at trial after having been informed of his or her right to counsel. See *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991). At a minimum, a sufficiently complete checklist or other docket entry may be used to establish a valid waiver of counsel as to prior convictions for enhancement purposes. *Green, supra*. When evidence, in whatever form, of a prior conviction is offered which is silent as to the representation of the defendant by counsel, the State must first lay a foundation for its admission by evidence tending to show that defendant was, in fact, represented by counsel or that he had knowingly and intelligently waived that right. *Klimas v. State*, 259 Ark. 301, 534 S.W.2d 202 (1976), *cert. denied* 429 U.S. 846, 97 S. Ct. 128, 50 L. Ed. 2d 117. Since the State has not met its burden of proof in establishing representation or a waiver of counsel during the arraignment and trial of the 1985 conviction, this conviction cannot be used to enhance Nowicki's sentence. Accordingly, only the 1987 conviction may be used to enhance the sentence. See *Green, supra* at 347, 470 N.W.2d at 751, where we held that a prior conviction could not be used for sentence enhancement, since "[t]he spaces provided for on the docket entry for waiver of counsel were left blank." See, also, *State v. Anderson*, 232 Neb. 349, 440 N.W.2d 257 (1989), where we decided that a prior conviction could not be used for sentence enhancement because the journal entry stated that the waiver of the right to counsel was " '(not) knowingly, voluntarily, and intelligently made.' " *Id.* at 350, 440 N.W.2d at 258. Apparently, the judge in that case failed to cross out the word "not" on the journal entry. It should be required practice for the trial judge to establish, when taking a factual basis for a plea, that a defendant either had counsel when he was previously convicted or waived his right to counsel. Since checklist docket entries are frequently the only reviewable documents of the prior conviction, trial judges should exercise extra care when marking them.

Because the certified copy of the 1985 conviction failed to

show the voluntary waiver of counsel by the defendant at the time of his conviction, it was insufficient to support a finding that the present offense is a third-offense drunk driving conviction.

The district court's affirmance of the sentence cannot be sustained. The judgment is reversed, and the cause is remanded to the district court with directions that it vacate and set aside the county court's sentence and remand the matter to that court for further proceedings pursuant to law.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., concurring.

I concur in the judgment of the court.

The rule stated in the opinion of the court that the record of a conviction offered for enhancement purposes must show that the defendant was represented by counsel or waived that right does not necessarily refer to an express waiver. A waiver can be inferred from conduct. See *State v. Tharp*, 224 Neb. 126, 395 N.W.2d 762 (1986).

The defendant in this case was advised of his right to counsel at the arraignment, and he was determined not to be an indigent person entitled to appointed counsel. At the next hearing the defendant again appeared without counsel but changed his plea from not guilty to no contest. At the third hearing, which was the sentencing hearing, the defendant again appeared without counsel and expressly waived his right to counsel. Under these circumstances I believe it could be inferred that the defendant waived his right to counsel by conduct.

If there is a deficiency in the record in this case, it is because the trial court used a checklist-type record which failed to show all of the circumstances concerning the defendant's attitude toward obtaining counsel to represent him. In future cases it might be well to supplement the checklist, or use a different form of order, so that there can be no question that the defendant elected to proceed in the absence of counsel after having been advised of his right to obtain counsel at his own expense.

STATE OF NEBRASKA, APPELLEE, V. RONALD L. MORLEY, APPELLANT.
STATE OF NEBRASKA, APPELLEE, V. WILLIAM A. MORLEY, APPELLANT.

474 N.W.2d 660

Filed September 20, 1991. Nos. 90-689, 90-702.

1. **Directed Verdict.** A defendant who moves for a directed verdict at the close of the State's evidence and who, upon the overruling of such motion, proceeds with the trial and introduces evidence waives any error in the ruling on the motion for a directed verdict.
2. **Criminal Law: Circumstantial Evidence: Proof.** In a criminal case based solely on circumstantial evidence, the State need not, in order to sustain its burden of proof, disprove every hypothesis but that of guilt.
3. **Criminal Law: Circumstantial Evidence: Evidence: Appeal and Error.** In criminal cases, circumstantial evidence is to be treated the same as direct evidence, and the State, upon review, is entitled to have all conflicting evidence, direct and circumstantial, viewed in its favor.
4. **Convictions: Circumstantial Evidence: Case Overruled.** Language in *State v. Trimble*, 220 Neb. 639, 371 N.W.2d 302 (1985), proclaiming that criminal convictions based solely on circumstantial evidence can stand only if the State has disproved every hypothesis but that of guilt, is rejected.
5. **Criminal Law: Words and Phrases.** The corpus delicti is the body or substance of the crime, the fact that a crime has been committed, without regard to the identity of the person committing it.
6. **Criminal Law: Circumstantial Evidence: Proof.** The corpus delicti may be proved by circumstantial evidence.
7. **Circumstantial Evidence: Words and Phrases.** Circumstantial evidence is proof of collateral facts and circumstances from which the mind infers the conclusion that the fact sought to be established existed.
8. **Pleadings: Judgments: Verdicts.** A motion for judgment notwithstanding the verdict, provided for by Neb. Rev. Stat. § 25-1315.02 (Reissue 1989), is limited to civil proceedings.
9. **Criminal Law: Effectiveness of Counsel: Proof.** To sustain a claim of ineffective assistance of counsel, a criminal defendant is required to show that counsel's performance was deficient and that such deficient performance prejudiced the defense such that the results of the proceedings would have been different but for counsel's deficient performance.
10. _____: _____: _____. Where a criminal defendant is unable to demonstrate sufficient prejudice, no examination of whether counsel's performance was deficient is necessary.
11. **Criminal Law: Directed Verdict.** A directed verdict in a criminal case is proper only when there is a complete failure of evidence to establish an essential element of the crime charged or when the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be

sustained.

12. **Criminal Law: Directed Verdict: Appeal and Error.** In an appellate court's consideration of a criminal defendant's motion for a directed verdict, the State is entitled to have all its relevant evidence accepted as true, every controverted fact resolved in its favor, and every beneficial inference reasonably deducible from the evidence.
13. **Constitutional Law: Convictions: Due Process: Proof.** In order to comport with the due process clause of the 14th amendment to the U.S. Constitution, criminal convictions may be had only upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which a defendant is charged.
14. **Jury Instructions: Appeal and Error.** Upon review of a jury instruction, an appellate court is to consider how reasonable jurors could have understood the instruction as a whole.
15. **Constitutional Law: Jury Instructions: Due Process: Proof.** An instruction which defines "reasonable doubt" in a manner which does not lessen the State's burden of proof below the requisite reasonable doubt standard does not run afoul of the due process requirements of U.S. Const. amend. XIV.
16. **Sentences: Probation and Parole: Appeal and Error.** The denial of probation and the imposition of a sentence within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Affirmed.

Dalton W. Tietjen, of Tietjen, Simon & Boyle, for appellants.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

I. INTRODUCTION

In case No. 90-689, the defendant-appellant Ronald L. Morley was charged with attempted burglary, in violation of Neb. Rev. Stat. §§ 28-201 and 28-507 (Reissue 1989). His brother, defendant-appellant William A. Morley, was charged with the same crime in case No. 90-702. In accordance with the verdicts delivered following a consolidated trial, the district court adjudged each of the brothers guilty as charged and sentenced each to a 6-month term of imprisonment in the county jail. In these separate but consolidated appeals, the brothers assign errors which combine to assert that (1) the

district court erred in overruling their motions to dismiss at the conclusion of the State's evidence, (2) the evidence was insufficient to support the verdicts and judgments entered thereon, (3) they received ineffective assistance of trial counsel, (4) the jury was improperly charged, and (5) the sentences imposed were excessive. We affirm.

II. FACTS

At approximately 2:30 a.m. on November 5, 1989, Officer Patrick Knopik of the Lincoln Police Department discovered the brothers in an alley behind an automobile-appearance-enhancing shop located in a Lincoln strip mall shopping center containing a number of facilities. The shop was located at the west end of the mall in a single-story multitenant building. A contiguous lot provided parking space for the shopping center.

The shop has two rear doors: a typical metal entry door with a locking doorknob located approximately 9 inches below a separate dead bolt lock, and an overhead garage-type door. The overhead door appears to be located about 3 feet east of the entry door and immediately west of a garbage Dumpster.

Knopik observed a person, who was wearing gloves and carrying an object in his right hand, walk in an easterly direction in front of his cruiser. The person bent over and placed the object next to the shop building behind the aforementioned Dumpster and then resumed walking easterly, away from Knopik, taking two or three steps before stopping and turning around near the center of the alley as Knopik stopped his cruiser. Knopik also saw a second person standing near the two doors at the rear of the shop.

Knopik got out of his cruiser and sought identification from the first person, William. Ronald proved to be the other person. At that time, neither brother offered an explanation for his presence.

Knopik placed both brothers onto the back seat of his cruiser, called for assistance, and inspected the area behind the Dumpster where he had seen William placing the object he had carried in his right hand. Knopik found a pry bar approximately 12 to 14 inches long with one flattened end. This

was the only object found near the Dumpster.

Knopik then returned to his cruiser and questioned the brothers, who claimed to be parking lot paint stripers looking for business. William told Knopik that their automobile was in the parking lot of an adjacent apartment complex, but it was not visible from Knopik's position. By this time, Officer James Foral of the Lincoln Police Department had arrived at the scene. The brothers were then separated, William being placed in Foral's cruiser and Ronald remaining in Knopik's.

The rear entry door to the shop appeared to have been tampered with. The State theorized that the flat end of the pry bar had been inserted into the space between the door and the jamb and the bar then pried against the door while force was simultaneously applied to the doorknob in an effort to increase the size of the gap between the door and the jamb such that the door would swing free.

The doorknob, although locked, was drooping and quite loose. The door was dented in the area between the knob and the dead bolt, which was not in a locked position. The metal doorjamb, in the area horizontal to the dents on the door, was scratched and scraped such that metal was freshly exposed and paint fragments protruded from the scraped surface. Several witnesses testified that the dents on the door and the marks on the jamb were consistent with markings observed on other doors that had been forcibly pried open.

The owner of the shop, who was called to the scene by the police between 2:40 and 3 a.m. on November 5, 1989, testified that he had worked late on November 4 and that although he had locked the rear entry door, he had forgotten to engage the dead bolt lock. He noticed that the doorknob on the entry door was looser to the touch than normal and drooping more than when he had left the shop the previous evening. He further testified that he had not previously noticed the dents in the entry door around the knob, which dents appeared new to him. In addition, the owner stated that the recovered pry bar was not his and that he had not noticed it in the area around the Dumpster the previous evening.

No useful fingerprints were found either near the entry door or on the pry bar itself. The State's trace evidence expert

conducted laboratory examinations of exterior paint scraped from the area around the doorknob and a paint chip found in the previously clean evidence bag into which the pry bar had been placed. The paint samples scraped from the building were similar in composition to the paint sample found in the bag, such that the sample from the bag could have come from the rear entry door of the shop.

The brothers' vehicle was found some 400 feet away, in a parking area within an apartment complex north and east of the shop. Knopik noticed various tools, a citizens band radio, a radar detector, some paint cans, and a hand-held spotlight plugged into the cigarette lighter of the vehicle.

Both brothers testified at the trial. They described their paint striping business, which they began in 1986, as one that was primarily conducted at night, that being the time when parking lots were empty.

As they both lived in the Omaha area, they met at an Omaha area truckstop between 9 and 10 p.m. on November 4 to discuss finishing some paint striping work they had begun in some metropolitan area parking lots. Because weather conditions were not favorable and Ronald had developed a headache, they decided against painting. Instead, they drove to Lincoln between 11 p.m. and midnight to look at some parking lots they had previously striped and at others on which they had unsuccessfully bid.

Between 1 and 2 a.m., they arrived at a grocery store across from the shopping center which housed the shop to look at the grocery store's parking lot. They had unsuccessfully bid to work on it in the past and planned to rebid in the future. They next drove across the street to the shopping center in question, a property on which they had never bid but which they viewed as "a potential business connection." They claim to have then driven to an apartment complex located behind the shopping center, continuing their search for possible jobs to bid. They parked their vehicle near the alley behind the mall, where it was later found by Knopik.

The brothers contend that while at the apartment complex parking lot, they noticed that the alley behind the mall had speed bumps and poles such as they often painted in the course

of their business. They also noticed, from their view of the rear of the mall, a ventilation fan of a type typically found in restaurants. This interested them because they sometimes steam-cleaned restaurant areas which accumulated grease.

William stated that by this time his brother's headache had become more severe, so they decided to walk to the area behind the mall and look more closely at the potential work there, hoping that the fresh air would help alleviate his brother's pain. While William claimed to have followed his brother as they walked down the alley toward the shop, Ronald testified that he had walked behind William.

William also testified that as he and his brother walked down the alley, he came upon a pry bar lying on the ground near the dumpster at the shop. William first testified that he picked up the pry bar, decided he would like to have it, then thought that it probably belonged to someone who had been working on an automobile, and so he placed it "up close to the building" behind the Dumpster. On cross-examination, he testified that he mentioned the bar to his brother as he picked it up, but that Ronald told him, without looking at William's find, to "put it back we don't need anymore junk." Ronald testified he did not notice William picking up a pry bar or remember William telling him he had found anything, but stated that it was possible because William was "always picking up stuff."

The brothers claim that William next walked around the west side of the shop to check the parking stalls there while Ronald was looking inside the shop through a window in one of the rear doors to see if there was any interior paint striping. As William came back from looking at the west parking area, he tapped Ronald on the shoulder and said it was time to go. It was at about this time that Knopik drove around the corner and into the alley. William specifically denied having the pry bar in his hand at the time Knopik drove into the alley, insisting that he had placed it behind the Dumpster prior to that time. He had no explanation for Knopik's testimony in that regard, other than that Knopik was mistaken. William also was at a loss to explain Knopik's immediate location of the bar behind the Dumpster, positing only that "[m]aybe it's procedure." Although he admitted having gloves in his possession, William specifically

denied having them on when Knopik arrived.

Several witnesses testified that they had received bids from the brothers to do striping work; that the brothers had done striping work for them, including some indoor striping and at least one job in Lincoln; that such work was typically done at night; that they were aware of no occurrences of burglaries during the times the brothers were so working; and that the brothers had unsuccessfully bid jobs in Lincoln, for which they had been encouraged to rebid.

Each brother denied attempting to break into the shop.

III. ANALYSIS

1. Motions to Dismiss

In the first summarized assignment of error, the brothers contend that the district court erred in overruling their motions to dismiss following the State's rest. This assignment has no merit.

A defendant who moves for a directed verdict at the close of the State's evidence and who, upon the overruling of such motion, proceeds with the trial and introduces evidence waives any error in the ruling on the motion for a directed verdict. *State v. Schwartz*, *ante* p. 84, 474 N.W.2d 461 (1991); *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991). As noted in part II above, the brothers chose to introduce evidence following the denial of their motions for dismissal.

The motions for dismissal, wherein the brothers sought to have the charges against them dismissed for the State's alleged failure to make out a prima facie case, were substantively identical to motions for directed verdict. Thus, the foregoing rule applies, and any claim of error the brothers wished to lodge against the district court's overruling of said motions was waived.

2. Sufficiency of Evidence

In the second summarized assignment of error, the brothers claim that in any event the district court should not have submitted the case to the jury because the evidence was insufficient. They urge not only that the evidence was circumstantial and subject to many interpretations, but that it

failed to establish the corpus delicti and failed to identify the brothers as the perpetrators of the crime charged.

We begin our analysis of this assignment by noting that the brothers were convicted of attempted burglary. Section 28-507(1) provides that a person "commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value." According to § 28-201, one is guilty of an attempt to commit a crime if he or she

> (a) Intentionally engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be; or
>
> . . . .
>
> (2) When causing a particular result is an element of the crime, a person shall be guilty of an attempt to commit the crime if, acting with the state of mind required to establish liability with respect to the attendant circumstances specified in the definition of the crime, he intentionally engages in conduct which is a substantial step in a course of conduct intended or known to cause such a result.

(a) Nature of Circumstantial Evidence

Relying on language from *State v. Trimble,* 220 Neb. 639, 371 N.W.2d 302 (1985), the brothers argue that where circumstantial evidence is susceptible to multiple interpretations, the ambiguity must be resolved in their favor.

It is true that in *Trimble*, this court, in reversing the defendant's convictions of theft and second degree arson, stated:

> The test of the sufficiency of circumstantial evidence in a criminal prosecution is whether the facts and circumstances tending to connect the accused with the crime charged are of such a conclusive nature as to exclude to a moral certainty every rational hypothesis except that of guilt. *State v. Costanzo*, 203 Neb. 586, 279 N.W.2d 404 (1979).

220 Neb. at 643, 371 N.W.2d at 305.

The brothers' argument, however, overlooks that earlier, in

State v. Buchanan, 210 Neb. 20, 312 N.W.2d 684 (1981), this court, in an opinion which thoroughly examined the issue, abandoned the rule that a criminal conviction could not be based solely on circumstantial evidence unless the State disproved every hypothesis but that of guilt. Thenceforth, in criminal cases, circumstantial evidence has usually been treated the same as direct evidence; the State, upon review, is entitled to have all conflicting evidence, direct and circumstantial, viewed in its favor. See, *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990); *State v. Saltzman*, 235 Neb. 964, 458 N.W.2d 239 (1990); *State v. Badami*, 235 Neb. 118, 453 N.W.2d 746 (1990); *State v. Reed*, 228 Neb. 645, 423 N.W.2d 777 (1988); *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984); *State v. Evans*, 215 Neb. 433, 338 N.W.2d 788 (1983); *State v. Workman*, 213 Neb. 479, 329 N.W.2d 571 (1983).

Trimble, supra, demonstrates only that on occasion the ghost of a dead rule of law returns to temporarily haunt the halls of justice. In an effort to exorcise this mischievous spirit, we hereby reject the *Trimble* language which improvidently proclaims that a criminal conviction based solely on circumstantial evidence can stand only if the State has disproved every hypothesis but that of guilt.

(b) Corpus Delicti

The brothers further argue that there was insufficient evidence to establish beyond a reasonable doubt the corpus delicti of the crime charged in that there was no adequate proof of an attempt to forcibly enter the shop.

"The corpus delicti is the body or substance of the crime, the fact that a crime has been committed, without regard to the identity of the person committing it." *State v. Sedlacek*, 178 Neb. 322, 326, 133 N.W.2d 380, 383 (1965). In other words, the corpus delicti in this case is the actual commission of attempted burglary. See *id.* While our law requires that the corpus delicti be proved beyond a reasonable doubt, *State v. George*, 228 Neb. 774, 424 N.W.2d 350 (1988), such proof may be established by circumstantial evidence, *Henn v. State*, 172 Neb. 597, 111 N.W.2d 385 (1961). "[C]ircumstantial evidence is proof of collateral facts and circumstances from which the

mind infers the conclusion that the fact sought to be established in fact existed." *State v. Lewis*, 177 Neb. 173, 177, 128 N.W.2d 610, 613 (1964). Accord *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991).

The brothers argue that because there was no eyewitness to an attempt to forcibly enter the shop and because the State's evidence did not conclusively demonstrate that the entry door had been pried open, the corpus delicti was not proven beyond a reasonable doubt.

There is no merit to this claim. The testimony that the marks on the entry door and jamb were consistent with marks found on other doors through which forcible entry had been attained, that the marks were freshly made, and that the doorknob was noticeably looser on November 5 than it had been when the owner left the shop on the previous evening permitted the jury to infer that an attempt to forcibly enter the shop was made on the morning of November 5. Contrary to the brothers' professed belief, there is no requirement that the State make a conclusive showing of the attempt or that there be an eyewitness account of such an endeavor. The State sustains its burden by introducing evidence from which the finder of fact may reasonably make the required inferences.

(c) Identity of Perpetrators

In arguing that the evidence fails to sufficiently establish that they were the perpetrators of the crime, the brothers make much of the fact that their version of the events of November 5 is plausible. That is certainly so, but the jury was under no requirement to believe their version of the events. *State v. Pelton*, 197 Neb. 412, 249 N.W.2d 484 (1977); *State v. Fowler*, 193 Neb. 420, 227 N.W.2d 589 (1975). The evidence establishing the corpus delicti, combined with the evidence which places the brothers at the scene, coupled with the testimony that William was seen carrying a pry bar while wearing gloves, supports the verdicts and consequently supports the judgments of the district court.

3. Performance of Trial Counsel

In the third summarized assignment of error, the brothers allege that the failure of their trial attorneys to move the court

for directed verdicts at the close of all the evidence or for judgments notwithstanding the verdicts constitutes ineffective assistance of counsel. The State, relying on *State v. Dixon*, 223 Neb. 316, 389 N.W.2d 307 (1986), claims that this issue is not properly before us because it has not been ruled upon by the trial court.

In *Dixon, supra*, this court did indeed refuse to entertain a claim of ineffective assistance of counsel raised for the first time on direct appeal. However, the *Dixon* court did not establish a rule barring such appellate claims in all circumstances; the determining factor is whether the record is sufficient to adequately review the question. "[W]hen the issue has not been raised nor ruled on by the trial court *and* necessitates an evidentiary hearing, we will not address the matter." (Emphasis supplied.) *Dixon, supra* at 321, 389 N.W.2d at 310.

Several decisions of this court clearly demonstrate that claims of ineffective assistance of counsel raised for the first time on direct appeal are not ipso facto to be dismissed. See, e.g., *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991); *State v. Sanders*, 235 Neb. 183, 455 N.W.2d 108 (1990); *State v. Jones*, 235 Neb. 1, 453 N.W.2d 447 (1990). In these cases now before us, because the ineffective assistance of counsel claim is directed specifically at the aforedescribed failures on the part of trial counsel, and in light of the resolution of the brothers' sufficiency of the evidence claims, no further evidentiary hearing is necessary, and the issue may thus properly be addressed at this time.

We note here that a motion for judgment notwithstanding the verdict, provided for by Neb. Rev. Stat. § 25-1315.02 (Reissue 1989), is limited to civil proceedings, there being no mention of such a remedy in Neb. Rev. Stat. §§ 29-2101 to 29-2106 (Reissue 1989), which detail remedies dealing with criminal procedure after a guilty verdict is entered in a criminal action. *State v. Torrence*, 192 Neb. 720, 224 N.W.2d 177 (1974), *disapproved on other grounds, State v. Harney*, 237 Neb. 512, 466 N.W.2d 540 (1991). Thus, the issue before this court is limited to whether the brothers received ineffective assistance of counsel because of their attorneys' failure to move

the trial court for directed verdicts at the close of all the evidence.

To sustain a claim of ineffective assistance of counsel, a defendant is required to show that counsel's performance was deficient and that such deficient performance prejudiced the defense such that the results of the proceedings would have been different but for counsel's deficient performance. *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991). However, where a defendant is unable to demonstrate sufficient prejudice, no examination of whether counsel's performance was deficient is necessary. *State v. Sanders, supra.*

A directed verdict in a criminal case is proper only when there is a complete failure of evidence to establish an essential element of the crime charged or when the evidence is so doubtful in character, lacking probative value, that a finding of guilt based on such evidence cannot be sustained. *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991). In this court's consideration of a defendant's motion for a directed verdict, the State is entitled to have all its relevant evidence accepted as true, every controverted fact resolved in its favor, and every beneficial inference reasonably deducible from the evidence. *Id.*

The discussion in part III(1), in which the propriety of the jury's verdicts was analyzed, demonstrates that a motion for directed verdicts at the close of the evidence could not have been properly sustained. Therefore, the brothers have demonstrated no prejudice by their attorneys' failure to move the trial court for directed verdicts at the close of all the evidence.

4. JURY CHARGE

In the fourth summarized assignment of error, the brothers, through a supplemental brief filed pursuant to leave, contend that in light of *Cage v. Louisiana*, ____ U.S. ____, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), which was decided during the pendency of these appeals, the jury was improperly charged concerning the State's burden of proof. More specifically, the brothers claim that a particular instruction misled the jury into finding them guilty on the basis of a lesser quantum of proof than is required under the due process clause of U.S. Const.

amend. XIV by inaccurately defining the "reasonable doubt" concept.

We begin our analysis of this issue by recalling that in order to comport with the due process clause of the 14th amendment, criminal convictions may be had only upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which a defendant is charged. *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). *Cage*, *supra*, demonstrates that where a court improperly defines the concept of reasonable doubt in its instructions to a jury, the mandate of *Winship* is not met, and due process is thus not accorded. *Cage* also reaffirms that upon review of a jury instruction, an appellate court is to consider how reasonable jurors could have understood the instruction as a whole. See *Francis v. Franklin*, 471 U.S. 307, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985).

With these concepts in mind, we turn to a comparison of the *Cage* instruction with the instruction in these cases.

The *Cage* instruction read, in pertinent part:

> " 'If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty.*' *State v. Cage*, 554 So.2d 39, 41 (La.1989)...."

(Emphasis in original.) 111 S. Ct. at 329.

In a unanimous opinion, the U.S. Supreme Court concluded that the instruction violated the due process clause of the 14th amendment, saying:

> In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole. [Citation omitted.] The charge did at one point instruct that to convict, guilt must be found beyond a reasonable doubt; but it then equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty. It is plain to us that the words "substantial" and "grave," as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

111 S. Ct. at 329-30.

The questioned instruction in the cases now before us reads:

> "**Reasonable doubt**" is such a doubt as would cause a reasonable and prudent man, in one of the graver and more important transactions of life, to pause and hesitate before taking the represented facts as true and relying and acting thereon. It is such a doubt as will not permit you, after full, fair, and impartial consideration of all the evidence, to have an abiding conviction, to a moral certainty, of the guilt of the accused. At the same time, absolute or mathematical certainty is not required. You may be convinced of the truth of a fact beyond reasonable doubt and yet be fully aware that possibly you may be mistaken. The jury may find an accused guilty upon the strong probabilities of the case, provided such probabilities are strong enough to exclude any doubt of his guilt that is reasonable. A reasonable doubt is an actual and substantial doubt reasonably arising from the evidence, from the facts and circumstances shown by the evidence, or from the lack of evidence on the part of the State, as distinguished from a doubt arising from mere possibility, from bare imagination, or from fanciful

conjecture.

The brothers assert that the questioned instruction is strikingly similar to the *Cage* instruction, and thus postulate that the questioned instruction must be deemed unconstitutional and their convictions accordingly reversed.

Such, however, is not the case. It is true that both the *Cage* instruction and the questioned instruction tell the jury that, in effect, a reasonable doubt is an actual and substantial one. But while the *Cage* instruction also equates a reasonable doubt with a grave one, the questioned instruction does not. The questioned instruction merely advises that a reasonable doubt is such as would cause a person "to pause and hesitate" when considering one of the "graver and more important transactions of life." Moreover, while a reasonable reading of the *Cage* instruction leads to the conclusion that an accused is to be convicted unless such doubt rises to the level of a moral certainty, the questioned instruction permits conviction only if the lack of such doubt is established to a moral certainty. In other words, under the *Cage* instruction a juror is to vote for conviction unless convinced to a moral certainty that there exists a reasonable doubt, whereas under the questioned instruction a juror is to vote for acquittal unless convinced to a moral certainty that no reasonable doubt exists. Those are two very different instructions; indeed, one contradicts the other. We therefore conclude that the questioned instruction in these cases does not lessen the State's burden of proof below the requisite reasonable doubt standard; the questioned instruction thus does not run afoul of the due process requirements of U.S. Const. amend. XIV.

We note that a number of courts likewise have distinguished the instructions challenged before them from the *Cage* instruction on a variety of grounds. E.g., *Adams v. State*, 587 So. 2d 1265 (Ala. Crim. App. 1991) (convict if convinced beyond a reasonable doubt and to moral certainty of guilt; defines reasonable doubt as not capricious, fanciful, vague, or imaginary, but as actual and substantial doubt arising from consideration of evidence or lack of it); *People v. Jennings*, 53 Cal. 3d 334, 807 P.2d 1009, 279 Cal. Rptr. 780 (1991) (acquit if juror lacks abiding conviction of truth of charge); *State v.*

Jones, 582 So. 2d 973 (La. App. 1991) (convict if convinced beyond a reasonable doubt, such being not a possible doubt, but an actual or substantial one such as reasonable person would seriously entertain, a serious doubt for which juror could give good reason); *State v. Turner*, 810 S.W.2d 92, 94 (Mo. App. 1991) (convict if " 'firmly convinced of the defendant's guilt' "). Accord *Lord v. State*, ____ Nev. ____, 806 P.2d 548 (1991) (convict if exists an abiding conviction of truth of charge, for there is then not a reasonable doubt, such a doubt being not a mere possible doubt, but one based on reason, one as would govern or control in more weighty affairs of life). Followed, *Felder v. State*, ____ Nev. ____, 810 P.2d 755 (1991); *Riley v. State*, ____ Nev. ____, 808 P.2d 551 (1991).

5. Propriety of Sentences

In the fifth summarized assignment of error, the brothers, arguing that the sentences imposed are excessive and constitute an abuse of discretion, specifically ask this court to reduce them to probation.

Attempted burglary is a Class IV felony and, as such, carries a maximum sentence of 5 years' imprisonment, a $10,000 fine, or both such imprisonment and fine. §§ 28-507 and 28-201 and Neb. Rev. Stat. § 28-105 (Reissue 1989). The oft-repeated rule in Nebraska is that the denial of probation and the imposition of a sentence within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion. *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991).

Foremost among the brothers' claims is that the imposition of a jail sentence will prove devastating to their future employment opportunities and work great hardship on their dependents. While it is true that incarceration may work a hardship on the brothers' dependents and that their future employment opportunities might be limited by their incarceration, those facts, standing alone, do not demonstrate that the trial court abused its discretion in imposing the sentences in these cases. Indeed, the record demonstrates that the trial court was made aware of those circumstances. We find nothing in the record from which it can be said that the trial

court abused its discretion in imposing its sentences.

IV. CONCLUSION

The record sustaining none of the summarized assignments of error, each of the judgments of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLANT, V. ROGER WEIKLE, APPELLEE.
474 N.W.2d 486

Filed September 20, 1991. No. 91-720.

Intercepted Communications. In order for an oral communication to be protected under the Nebraska intercepted communication statutes, the person making the statement must have a subjective expectation of privacy which is objectively reasonable under the circumstances.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Reversed.

Gary E. Lacey, Lancaster County Attorney, and David Stempson for appellant.

Dennis R. Keefe, Lancaster County Public Defender, and Richard L. Goos for appellee.

BOSLAUGH, J.

Pursuant to Neb. Rev. Stat. § 29-116 (Reissue 1989), the State seeks interlocutory review of the district court's order of July 3, 1991, which granted the defendant's motion to suppress statements made by the defendant while he was in his prison cell and overheard through the prison's intercom system. The statements related to an assault upon a guard on October 2, 1989, by the defendant which had occurred earlier that evening.

As a result of the assault the defendant was charged with conspiracy to commit first degree murder, attempted first degree murder, and use of a weapon in the commission of a felony. The defendant filed a motion to suppress the statements he had made while in his prison cell which were overheard by a guard through the prison's intercom system in the early

morning hours of October 3, 1989. The following is a summary of the evidence presented at the March 20, 1991, hearing on the defendant's motion to suppress.

Corporal John Graham, an officer at the Nebraska State Penitentiary, stated that he was advised on October 2, 1989, prior to commencing his 10 p.m. to 6 a.m. shift, that Officer Harrington had been stabbed in the penitentiary law library. He was further informed that the defendant and another inmate, Keith Marion, were being questioned about the stabbing. The two inmates occupied separate cells in housing unit 5, to which Corporal Graham was assigned.

Housing unit 5 is the disciplinary facility at the penitentiary and is used to house inmates who have violated prison rules and regulations. The inmates are housed in single-unit cells, but they can communicate with each other by talking through the crack in their cell doors.

Each cell in housing unit 5 is equipped with a microphone-speaker which can be turned on and off by the unit's guard. Through this intercom system an inmate and the guard are able to communicate with each other. If an inmate needs to talk to a guard, he generally yells out, and the guard then turns on the intercom. An inmate is unable to tell whether the intercom in his cell is turned on or not.

On the evening of October 2, 1989, the defendant waived his *Miranda* rights and made statements to a state investigator regarding the stabbing of Officer Harrington. At approximately 12:40 a.m. he was returned to his cell in housing unit 5. At that time, Corporal Graham turned on the intercom in the defendant's and Marion's cells and overheard them talking about the stabbing. Later, when the defendant began talking with another inmate named Hatcher, Corporal Graham turned off Marion's microphone and turned on Hatcher's.

Corporal Graham wrote down what was said between the defendant and the other two inmates. These are the statements which the defendant seeks to suppress.

The defendant testified that although he did not expressly consent to having his conversations between himself and the other two inmates monitored, he did know that there were microphones in all of the cells, and he knew that if they were

turned on, his conversation could be overheard by the prison officials. Furthermore, the defendant's conversation with Marion could be heard by other inmates because the defendant's and Marion's cells were separated by eight other inmates' cells.

Despite the defendant's knowledge of the capabilities of the intercom system and the fact that other inmates could overhear the defendant's conversation, the district court granted the defendant's motion to suppress, relying on Nebraska's intercepted communication statutes, Neb. Rev. Stat. §§ 86-701 through 86-712 (Reissue 1987 & Cum. Supp. 1990). The district court found that the defendant's communications were oral communications within the meaning of the statutes because the defendant had a reasonable expectation that his conversations would not be monitored, even though he knew they could be monitored at any time.

A trial court's ruling on a motion to suppress will be upheld unless its findings are clearly erroneous. *State v. Patterson*, 237 Neb. 198, 465 N.W.2d 743 (1991).

As stated in *State v. Hinton*, 226 Neb. 787, 794, 415 N.W.2d 138, 143 (1987), §§ 86-701 through 86-712 make

> it unlawful to, among other things, deliberately intercept or attempt to intercept, through any means, including through the use of any "electronic, mechanical, or other device," any wire or oral communications, unless the interceptor has previously obtained a court order permitting the interception or is a party to the communication, or one of the parties to the communication has previously consented to the interception.

For the defendant's statements to fall within the protection of these statutes, the conversation must be determined to be an "oral communication." An oral communication is defined to be "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . . ." § 86-701(12) (Cum. Supp. 1990).

The Nebraska intercepted communication statutes are patterned after title III of the Omnibus Crime Control and Safe

Streets Act of 1968, 18 U.S.C. §§ 2510 et seq. (1988), as amended. See *Hinton, supra*. Thus, Nebraska looks to federal law in interpreting the provisions of the Nebraska intercepted communication statutes. *Id.*

The legislative history of the federal act is helpful in determining whether the defendant's statements in this case were within the statute's definition of an oral statement. The report of the Senate Judiciary Committee states that the definition of "oral communication" as provided in the statute "is intended to reflect existing law. . . . The person's subjective intent or the place where the communication is uttered is not necessarily the controlling factor. . . . Nevertheless, such an expectation would clearly be unjustified in certain areas; for example, a jail cell . . . ." (Citations omitted.) S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 2112, 2178. See, also, *Illinois v. Perkins*, 496 U.S. 292, 110 S. Ct. 2394, 110 L. Ed. 2d 243 (1990).

The court in *United States v. McIntyre*, 582 F.2d 1221 (9th Cir. 1978) stated there is a two-pronged analysis in determining whether a statement is an oral communication as defined by the statute. In order for a statement to fall within the statute's definition, the communication must be uttered by a person (1) who has a subjective expectation of privacy and (2) whose expectation is objectively reasonable under the circumstances. *Id.*

In *State v. Williams*, 690 S.W.2d 517 (Tenn. 1985), the defendant and his codefendant had been arrested for murder. While they were occupying the same jail cell, police officers recorded their conversation. The recorded conversation was used at trial to convict the defendant. The Tennessee Supreme Court found that 18 U.S.C. §§ 2510 et seq. was not applicable to exclude the recorded conversation from evidence because the defendant's statements were not a protected oral communication under the act because he did not have the required expectation of privacy, since "such an expectation of privacy is not justified in a jail cell." 690 S.W.2d at 524.

In upholding the admission into evidence of a monitored and tape-recorded conversation between the defendant and his uncle in a police interrogation room, the California Court of

Appeals, in *In re Joseph A.*, 30 Cal. App. 3d 880, 106 Cal. Rptr. 729 (1973), stated as the rationale for its conclusion that there is no reasonable expectation of privacy as to oral communications within a police station or jail facility. The policy behind the court's conclusion favors the use by jail authorities of reasonable security measures. *Id.* Quoting *North v. Superior Court*, 8 Cal. 3d 301, 502 P.2d 1305, 104 Cal. Rptr. 833 (1972), the court stated: " 'A man detained in jail cannot reasonably expect to enjoy the privacy afforded to a person in a free society. His lack of privacy is a necessary adjunct to his imprisonment. . . .' " 30 Cal. App. 3d at 884, 106 Cal. Rptr. at 732.

In this case, the defendant had just been returned to his cell after being questioned about the stabbing of Officer Harrington when he made the statements he seeks to suppress. The defendant knew other inmates could hear his conversation, and he was aware of the intercom in his cell and that he could be overheard if it was turned on. Under these circumstances the defendant may be held to have assumed that his conversations with other inmates might be monitored or overheard, and accordingly, the defendant had no reasonable expectation of privacy as to the statements made to his fellow inmates.

Based on the foregoing, the district court's finding that the defendant's statements were oral communications within the meaning of §§ 86-701 through 86-712 and were therefore inadmissible was erroneous, and its order granting the defendant's motion to suppress must be reversed.

REVERSED.

CHARLES DENNIS ZYBURO, APPELLANT, V. BOARD OF EDUCATION OF LANCASTER COUNTY SCHOOL DISTRICT 160 AND LANCASTER COUNTY SCHOOL DISTRICT 160, APPELLEES.

474 N.W.2d 671

Filed September 27, 1991. No. 89-209.

1. **Schools and School Districts: Teacher Contracts: Parties.** Contracts for the permanent employment of certificated school guidance counselors are entered into with the school district by and through its school board; the school district is the real party in interest to a dispute concerning the discharge of a permanently employed certificated school employee.
2. **Schools and School Districts: Teacher Contracts: Parties: Appeal and Error.** Without regard to the constitutional validity of 1991 Neb. Laws, L.B. 511, it was and remains sufficient in an error proceeding challenging the discharge of a permanently employed certificated school employee to name either the school district, its board, or both, as the party defendants.
3. **Judgments: Records: Time: Appeal and Error.** Proceedings in error must be commenced within 30 days from the rendition of the final order or judgment concerning which complaint is made by filing with the district court a petition and authenticated transcript containing the challenged order or judgment, and any other material related thereto which the petitioner wishes to have considered.
4. **Limitations of Actions: Appeal and Error.** Failure to institute error proceedings within the time limitation bars the action.
5. **Actions: Pleadings: Parties: Notice: Limitations of Actions.** The relation of an amended pleading back to the original filing is dependent upon four factors, all of which must be satisfied: (1) The basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.
6. **Rules of the Supreme Court: Records: Appeal and Error.** Neb. Ct. R. of Prac. 5F(3) (rev. 1989) and Neb. Ct. R. of Official Ct. Rptrs. 19f(3) (rev. 1989) require that exhibits be bound in the manner therein provided.
7. _____: _____: _____. Although a trial court is not required to accept a transcript containing material not prepared in accordance with the rules of the Nebraska Supreme Court, if it does so, it acquires the obligation to correct any deficiencies in the form of that material which becomes a part of its bill of exceptions.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Reversed and remanded for further proceedings.

Robert Wm. Chapin, Jr., for appellant.

Edwin C. Perry, of Perry, Guthery, Haase & Gessford, P.C., for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Following a hearing before the appellee Board of Education of Lancaster County School District 160, the plaintiff-appellant, Charles Dennis Zyburo, was discharged from his permanent employment as a certificated guidance counselor. He began this quest for judicial review by filing, through an attorney who was a former member of the Legislature, a petition in error, claiming that his employment with the board had been terminated unlawfully and naming the board as defendant. Finding that the board was not the proper party defendant, the court below sustained the board's special appearance.

Zyburo next, through his present attorney, and pursuant to leave, filed an amended petition. This time he alleged that he had been employed by the appellee Lancaster County School District 160 and named the district as defendant. The court below found that the amended petition had not been seasonably filed, sustained the district's special appearance to that pleading, and dismissed the entire action. This appeal was then perfected.

Thereafter, the Legislature purportedly adopted 1991 Neb. Laws, L.B. 511, which, in relevant part, undertakes to designate "the school district, school board, or both" as proper party defendants in error proceedings challenging the discharge of permanently employed certificated school employees. This was done on the 88th day of the 90-day session by substituting for the original contents of L.B. 511, dealing with rivers and related topics, material concerning a variety of educational matters, including the language which is the subject of this dispute. (This latter language was first placed before the Legislature on the 39th legislative day as an amendment to an earlier bill dealing with the discharge of certificated school

employees.) On the last legislative day, 2 days after its metamorphosis, L.B. 511 was professedly voted into law with the emergency clause.

The appellees first assert that the court below acquired no jurisdiction over them because Zyburo failed to perfect service on either of them. They also claim that the Legislature's transmogrification of L.B. 511 violated Neb. Const. art. III, § 14, which provides, inter alia, that no "vote upon the final passage of any bill shall be taken . . . until five legislative days after its introduction . . . ." Zyburo defends both the service he obtained and the Legislature's intervention. He also urges that, in any event, the court below erred because even under the law as it existed before the Legislature's machinations, the board was the proper party defendant and, if not, the amended petition against the district related back to the filing of the original petition and was thus seasonably filed.

Because resolution of the appellees' contention concerning the method of service depends upon the pre-L.B. 511 relationship between the board and district, we begin by analyzing that situation.

A school district was and continues to be defined as "the territory under the jurisdiction of a single school board." Neb. Rev. Stat. § 79-101(1) (Reissue 1987 & Cum. Supp. 1990). It was and remains a body corporate, "possess[ing] all the usual powers of a corporation for public purposes, may sue and be sued, and may purchase, hold, and sell such personal and real estate as the law allows." Neb. Rev. Stat. § 79-401 (Reissue 1987 & Cum. Supp. 1990).

A school board or board of education was and is "the governing body of any school district." § 79-101(11). A school board, as such, was and continues to be obligated to provide the necessary appendages for the schoolhouse, keep the same in good condition and repair during the time school is to be taught, and keep an accurate account of all expenses incurred; it also had and has the care and custody of the schoolhouse and other property of the school district, and the authority to hire a superintendent, the required number of teachers, and other necessary personnel. Neb. Rev. Stat. §§ 79-440 and 79-441 (Reissue 1987).

While a school district had in the past and continues to have the ability to sue and be sued, it was and is the school board which exercises this power as the school district's governing body. Neb. Rev. Stat. § 79-455 (Reissue 1987) then provided, as it does now: "It shall also be the duty of the president [of the school board] to appear for and on behalf of the district in all suits brought by or against the same." Hence, it was and is the duty of a school board president to see that the interests of the school district are protected.

In addition to the school board's past and present duty to maintain the schools and hire staff, chapter 79 of the statutes was and continues to be replete with sections which relate to school districts but specifically reference school boards as the governing body to carry out a school district's function. For example, Neb. Rev. Stat. § 79-402.03 (Reissue 1987 & Cum. Supp. 1990) provided and continues to provide that changes in boundaries or the creation of new districts from other districts may be initiated or accepted by school boards. In addition, transfers of territory could in the past and may now be transacted by the school board. See Neb. Rev. Stat. § 79-403.03 (Reissue 1987). Improvements within the school district required and continue to require action by the school board. See Neb. Rev. Stat. § 79-422 (Reissue 1987). The power of eminent domain given to the school district under Neb. Rev. Stat. § 79-4,107 (Reissue 1987) was and is exercised by the school board. See *Father Flanagan's Boys' Home v. Millard School Dist.*, 196 Neb. 299, 242 N.W.2d 637 (1976).

In respect to employment contracts for a school district, Neb. Rev. Stat. § 79-1249 (Reissue 1987) provided and continues to provide that a "majority of the members of a school board or board of education of any district *may enter into a contract of employment* with a legally qualified teacher or administrator." (Emphasis supplied.) Neb. Rev. Stat. § 79-1250 (Reissue 1987) articulated and still articulates that a "contract for employment of a teacher or administrator shall contain (1) a provision whereby the employed person affirms that . . . he is *not under contract with another school board* or board of education of a school district in this state . . . ." (Emphasis supplied.) Neb. Rev. Stat. § 79-1251 (Reissue 1987)

prohibited and continues to prohibit a school board from entering into a contract of employment with a person who is under contract with another board. Moreover, the relevant statutes granted and continue to grant the school board the power to amend, modify, cancel, or terminate employment contracts. See Neb. Rev. Stat. §§ 79-12,107 through 79-12,121 (Reissue 1987). Additionally, § 79-12,107(3) stated and continues to state, in relevant part, that "[p]robationary certificated employee shall mean a teacher or administrator who has served under a contract with the *school district* for less than three successive school years . . . ." (Emphasis supplied.) It is under the authority of these employment contract statutes that the board in this case conducted the hearing which resulted in the termination of Zyburo's contract.

The statutory scheme thus leads to the conclusion that contracts for the employment of certificated school employees of the type involved in this case are entered into with the school district by and through its school board. See, *Matrisciano v. Board of Ed. of Sch. Dist. No. 6*, 236 Neb. 133, 459 N.W.2d 230 (1990); *Brown v. Board of Education*, 231 Neb. 108, 435 N.W.2d 184 (1989); *Jeter v. Board of Education*, 231 Neb. 80, 435 N.W.2d 170 (1989); *Kennedy v. Board of Ed. of Sch. Dist. of Ogallala*, 230 Neb. 68, 430 N.W.2d 49 (1988); *Trolson v. Board of Ed. of Sch. Dist. of Blair*, 229 Neb. 37, 424 N.W.2d 881 (1988); *Niedbalski v. Board of Ed. of Sch. Dist. No. 24*, 227 Neb. 516, 418 N.W.2d 565 (1988); *Nuzum v. Board of Ed. of Sch. Dist. of Arnold*, 227 Neb. 387, 417 N.W.2d 779 (1988).

Thus, there is no question that the district is the real party in interest to a dispute concerning the discharge of a permanently employed certificated school employee. Indeed, in apparent recognition of this circumstance, the contract in question recites that the board "agree[s] to employ" Zyburo "in the schools of the district" and that the agreement is "made by and between" the district and Zyburo. The question, rather, is how, in an error proceeding challenging the discharge of a permanently employed certificated school employee, the district is to be designated. At least for this purpose, the relevant statutes, even before the enactment of L.B. 511, treated school districts and school boards as the alter ego of the

other. That state of affairs, combined with the requirement that a due process hearing be had before the school board, compels the conclusion that without regard to the constitutional validity of L.B. 511, in such an error proceeding it was and remains proper to name either the school district, its board, or both, as the party defendants.

Yet, if, as appellees assert, Zyburo did not obtain proper service of summons upon either the board or the district, the foregoing determination avails Zyburo nothing. The method of service is controlled by Neb. Rev. Stat. § 25-1903 (Reissue 1989), which provides, in relevant part, that upon the filing of a petition in error "summons shall issue and be served . . . as in the commencement of an action," but that "service on the attorney of record in the original case shall be sufficient."

The appellees contend that Kelley Baker was their attorney in the original case, that is, in the proceeding before the board, and not Edwin C. Perry, the attorney Zyburo served. They therefore argue that service upon Perry did not comply with the requirements of § 25-1903, failed to give them notice of the error proceeding, and failed to confer jurisdiction over either of them upon the court below.

Such, however, is not the case. The record reveals it was Perry who directed the case before the board against Zyburo and cross-examined Zyburo's witnesses. Baker was the hearing examiner for the board, whose function was, in his own words, "to assist in the running of the meeting and to make judgments regarding motions and issues of law subject to being overruled by the president of the Board of Education or the members of the Board of Education itself . . . ." Baker was therefore the arbitrator for the hearing and not the representative attorney for either the board or the district; it was Perry who served in that latter capacity. Consequently, service upon him was service on the attorney of record in the original case.

Our analysis is still not finished, for Zyburo's failure to stand on his original petition against the board, and election instead to file an amended petition against the district, raises an additional issue, the timeliness of his amended petition. Proceedings in error must be commenced within 30 days from the rendition of the final order or judgment concerning which

complaint is made by filing with the district court a petition and authenticated transcript containing the challenged order or judgment, and any other material related thereto which the petitioner wishes to have considered. See, Neb. Rev. Stat. §§ 25-1901, 25-1903, and 25-1931 (Reissue 1989); *Marcotte v. City of Omaha*, 196 Neb. 217, 241 N.W.2d 838 (1976). Failure to institute the proceeding within the stated time limitation bars the action. See *Moell v. Mennonite Deaconess Home & Hosp.*, 221 Neb. 168, 375 N.W.2d 618 (1985).

The petition against the board was filed within 30 days of the board's order discharging Zyburo; however, the amended petition against the district was not. Zyburo argues that the substitution of parties does not render the amended petition untimely, as the original petition naming the board gave the district notice of the suit within the 30-day limitations period.

Schiavone v. Fortune, 477 U.S. 21, 106 S. Ct. 2379, 91 L. Ed. 2d 18 (1986), holds that an amendment substituting parties relates back to the original complaint when a defendant has notice of the first complaint prior to the time bar. The plaintiffs in *Schiavone* attempted to serve defendant Fortune with complaints based on libel. The complaints were filed before the period of limitations had run, but served after the time had expired. Defendant, arguing plaintiffs failed to name the proper party in the actions, claimed the suits were against Fortune, a trade name for Time, Incorporated, the party which should have been named. After the actions were time barred, the plaintiffs amended the complaints to name Time, Incorporated, as defendant. The U.S. Supreme Court refused to permit plaintiffs to proceed with their actions because "neither Fortune nor Time received notice of the filing until after the period of limitations had run. Thus, there was no proper notice to Fortune that could be imputed to Time." 477 U.S. at 29. The Court stated, however, that the "[t]imely filing of a complaint, and notice within the limitations period to the party named in the complaint, permit imputation of notice to a subsequently named and sufficiently related party." *Id.* In regard to Fed. R. Civ. P. 15(c), the Court noted at 477 U.S. at 29:

> Relation back is dependent upon four factors, all of which

must be satisfied: (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Although Nebraska does not have a rule similar to rule 15(c), this court has nevertheless acknowledged the similarity between rule 15(c) and its case law, and has looked to federal decisions for guidance. See *West Omaha Inv. v. S.I.D. No. 48*, 227 Neb. 785, 420 N.W.2d 291 (1988) (holding that if the general facts upon which right to recover is based are the same, amendment relates back to original pleading). Thus, we have held that an amendment which substantially changes the nature of the claim or defense is not permitted. See *Malerbi v. Central Reserve Life*, 225 Neb. 543, 407 N.W.2d 157 (1987). We have also suggested that where the defendant is prejudiced and the statute of limitations has run, an amendment will not relate back to the time of the original filing. See, *Chlopek v. Schmall*, 224 Neb. 78, 396 N.W.2d 103 (1986); *Baker v. A. C. Nelson Co.*, 185 Neb. 128, 174 N.W.2d 197 (1970). In *Scottsbluff Typewriter Leasing v. Beverly Ent.*, 230 Neb. 699, 432 N.W.2d 844 (1988), plaintiff obtained a judgment against Beverly Enterprises Inc., the defendant named as the owner of the Scottsbluff Villa. The named defendant moved to quash execution of the judgment, arguing that Scottsbluff Villa was owned by Beverly Enterprises - Nebraska, Inc., not by Beverly Enterprises, Inc. The district court then sustained plaintiff's motion to amend the judgment in order to correct the name. We affirmed, holding that the record presented failed to show that the owner was misled by the designation of Beverly Enterprises Inc. as the defendant.

Thus, as Zyburo correctly argues, the keystone determining whether a change in party defendant relates back to the original pleading is whether the substituted party had notice of the suit within the period of limitations. Since at least for the purposes involved in this case the board and the district are one and the

same, service upon the board gave the district notice within the limitations period that it was a party to the action, and it was thus not prejudiced by the substitution of its name for that of the board.

The foregoing makes it unnecessary for us to determine the constitutional legitimacy of the process by which L.B. 511 was transformed from a bill dealing with rivers into one dealing with education. Neither is it necessary for us to determine whether the distribution of powers provision of Neb. Const. art. II permits the Legislature to designate the parties to a case and controversy. Nor are we required to review once again the efficacy of a legislative effort to retroactively breathe life into an expired judicial process.

Because the analyses required to resolve this present appeal did not require a detailed study of the bill of exceptions from the court below, it is unnecessary that we at this time take any action for the failure to have submitted a bill which complies with our rules. See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991). The bill includes 78 exhibits containing 527 sheets of paper tossed unbound into an envelope as a separate volume of the bill. Our rules require that exhibits be bound and placed in the bill of exceptions in the manner specified. See, Neb. Ct. R. of Prac. 5F(3) (rev. 1989); Neb. Ct. R. of Official Ct. Rptrs. 19f(3) (rev. 1989); *Langness v. "O" Street Carpet Shop*, 217 Neb. 569, 353 N.W.2d 709 (1984).

We recognize that the nonconforming portion of the bill of exceptions was not prepared in the court below but, rather, consists of the portion of the transcript prepared on behalf of the board, which contains a verbatim transcription of the oral testimony. However, our rules apply to all bills of exceptions filed in this court, no matter in what tribunal they or any portion of them may have been prepared. Neb. Ct. R. of Prac. 5I (rev. 1989); Neb. Ct. R. of Official Ct. Rptrs. 19i (rev. 1989). While the court below was not required to accept a transcript containing material not prepared in accordance with our rules, once it did so, it acquired the obligation to correct any deficiencies in the form of that material which became part of its bill of exceptions.

The lower court's order of dismissal is reversed and the cause

remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

AL PUGH, APPELLEE AND CROSS-APPELLANT, V. GREAT PLAINS INSURANCE CO., INC., A NEBRASKA INSURANCE CORPORATION, APPELLANT AND CROSS-APPELLEE.

474 N.W.2d 677

Filed September 27, 1991. No. 89-425.

1. **Judgments: Verdicts.** On a motion for judgment notwithstanding the verdict, the movant is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.
2. **Motions to Dismiss.** A party against whom a motion to dismiss is directed is entitled to have all relevant evidence accepted or treated as true, every controverted fact as favorably resolved, and every beneficial inference reasonably deducible from the evidence.
3. **Directed Verdict.** A court cannot decide an issue as a matter of law unless the facts adduced on an issue are such that reasonable minds can draw but one conclusion from the evidence. In a jury trial, when evidence compels but one reasonable conclusion regarding an issue or question in the litigation, a court can properly direct a verdict on such issue or question.
4. **Jury Instructions: Proof: Appeal and Error.** In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant.
5. **Prejudgment Interest: Claims.** Prejudgment interest is allowed where the amount of the claim is liquidated. When a reasonable controversy exists concerning the claimant's right to recover or the amount of such recovery, the claim is unliquidated, and prejudgment interest is not allowed.
6. _____: _____. The amount of a claim is liquidated when the evidence furnishes a basis to compute an exact amount determinable without opinion or discretion inherent in the factfinding process.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed as modified.

William E. Pfeiffer for appellant.

Jeanne A. Weaver, of Zweiback, Hotz & Lamberty, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

Al Pugh commenced an action against Great Plains Insurance Co., Inc., to collect commissions claimed under two agency agreements. Great Plains appeals from judgments entered on the verdicts for Pugh.

STANDARD OF REVIEW (DIRECTED VERDICT; JUDGMENT N.O.V.)

Among its assignments of error, Great Plains contends that the district court should have directed a verdict on Pugh's second cause of action and should have entered judgment for Great Plains notwithstanding the verdict (judgment n.o.v.) for Pugh on his second cause of action.

> On a motion for judgment n.o.v., the movant is deemed to have admitted as true all the relevant evidence admitted which is favorable to the party against whom the motion is directed, and, further, the party against whom the motion is directed is entitled to the benefit of all proper inferences deducible from the relevant evidence.

Dunn v. Hemberger, 230 Neb. 171, 180, 430 N.W.2d 516, 522 (1988). Accord, *Kelly Klosure v. Johnson Grant & Co.*, 229 Neb. 369, 427 N.W.2d 44 (1988); *Havlicek v. Desai*, 225 Neb. 222, 403 N.W.2d 386 (1987).

"A party against whom a motion to dismiss is directed is entitled to have all relevant evidence accepted or treated as true, every controverted fact as favorably resolved, and every beneficial inference reasonably deducible from the evidence." *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 850, 438 N.W.2d 485, 489 (1989). Accord, *Dale v. Thomas Funeral Home*, 237 Neb. 528, 466 N.W.2d 805 (1991); *Anderson v. Union Pacific RR. Co.*, 229 Neb. 321, 426 N.W.2d 518 (1988); *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987).

A court cannot decide an issue as a matter of law unless

> the facts adduced on an issue are such that reasonable minds can draw but one conclusion from the evidence. [Citation omitted.] In a jury trial, when evidence compels but one reasonable conclusion regarding an issue or question in the litigation, a court can properly direct a verdict on such issue or question.

Anderson v. Union Pacific RR. Co., supra at 323, 426 N.W.2d at 519. Accord, *Dale v. Thomas Funeral Home, supra*; *Burns v. Veterans of Foreign Wars, supra*; *Rahmig v. Mosley Machinery Co., supra.*

FIRST CAUSE OF ACTION

Pugh was employed by Great Plains and was responsible for sales and service of credit life insurance, credit disability insurance, and various lender security or collateral protection programs, designated "lenders' security programs," offered by banks. These programs, conducted by Empire Life Insurance Company, a Great Plains affiliate, provided insurance coverage for U.S. National Bank (Norwest) and First National Bank on loans from the banks. In view of the extensive paperwork associated with the insurance programs, Great Plains hired Management Insurance Consultants to provide computer services and assistance in lenders' security programs. Pugh was Empire's liaison between the banks and Management Insurance Consultants. In 1983, Great Plains transferred the credit life and credit disability insurance to Eagle Life Insurance Company, another Great Plains affiliate, and assigned Pugh to Eagle.

In November or December 1983, Norman Rips, the chairman of the board and chief executive officer of Great Plains, and Jeffrey Silver, secretary and general counsel of Great Plains, told Pugh that he would receive a 10-percent commission on premiums paid by First National and U.S. National in connection with lenders' security programs. Rips had authority to enter such an agreement on behalf of Great Plains and acknowledged that Great Plains "had certain kinds of specialty coverages [lender security coverage] which [Pugh] attempted to write on our [Great Plains'] behalf. And if he did so, [Great Plains] would pay him a commission. . . . [H]e was

supposed to get around 10 percent commission . . . ."

Pugh and Great Plains stipulated that the amount of premiums paid by the banks was $141,340.61 on March 31, 1985; hence, Pugh claimed a commission based on 10 percent of $141,340.61, or $14,134.06.

SECOND CAUSE OF ACTION

Pugh agreed to assist Great Plains in development and service of a warranty insurance program for The ALCO Company, a Colorado corporation which manufactured and sold replacement doors and windows. The extended warranty coverage was in addition to ALCO's factory warranty on its products. ALCO sold the extended warranties for periods of 5 years, 10 years, or the life of an ALCO product. When a customer purchased the extended coverage, ALCO sent the "premium" to Great Plains, which retained 17.5 percent of the premium and sent the remaining 82.5 percent to an insurance company which maintained a claim fund for the ALCO warranties. Of the 17.5 percent retained by Great Plains, Pugh was supposed to receive 28.57 percent, representing 5 percent of the total premium paid by ALCO, while Great Plains would retain 71.43 percent, or 12.5 percent of the total premium paid by ALCO.

Between the fall of 1984 and May 1985, ALCO sold extended warranties, but failed to remit premiums collected for the coverage. In May 1985, Pugh met with ALCO regarding the unremitted premiums due Great Plains and obtained ALCO's check for $193,213, the amount of the unremitted premiums. However, when ALCO later notified Pugh that the check would not clear, ALCO's check was not deposited. Silver, on behalf of Great Plains, wrote several demand letters to ALCO and stated that Great Plains had "yet to receive its first dollar of premium" for the warranty coverage and emphasized "ALCO's retention of insurance premiums due and owing to Great Plains" concerning the coverage. Silver informed ALCO that, based on the "total written premiums," Great Plains claimed a "cancellation fee" of $102,750. Subsequently, Great Plains and ALCO settled their dispute by a settlement of $70,000 reflected in a cash payment of $40,000 to Great Plains and ALCO's

promissory note to Great Plains for $30,000. Pugh discovered the negotiated settlement and ALCO's eventual payment of $60,000 in accordance with the settlement. For that reason, Pugh requested that he be paid his commission pursuant to the agency agreement, that is, 28.57 percent of the $60,000 settlement payment, or $17,142. Great Plains paid Pugh $2,500, leaving a balance of $14,642 on Pugh's claimed commission, but refused further payment to Pugh because, as Great Plains asserted, any payment from ALCO was a "cancellation fee" and, therefore, not subject to the Pugh-Great Plains agency agreement for Pugh's commission.

INSTRUCTION NO. 4

Over Great Plains' objection, the court instructed:

> Before the plaintiff can recover against defendant on his first cause of action, the burden is upon the plaintiff to prove by a preponderance of the evidence each and all of the following propositions:
>
> 1. That the parties entered into a valid agreement;
>
> 2. That the agreement remained in effect from January 1, 1984 through the time the net premiums for the Lenders Security Insurance policies issued to Norwest and First National Bank were received;
>
> 3. That the plaintiff complied with the terms of the agreement;
>
> 4. That the defendant breached the agreement by failing to pay the amount due under the agreement.
>
> If the plaintiff has failed to establish any one or more of the foregoing numbered propositions by a preponderance of the evidence, your verdict on the first cause of action will be for the defendant.
>
> On the other hand, if the plaintiff has established, by a preponderance of the evidence, all of the above-numbered propositions, then your verdict will be for the plaintiff in the amount of $14,134.06 in his first cause of action.

At the conclusion of all evidence, Great Plains moved for a directed verdict on Pugh's second cause of action (ALCO transaction). The court overruled Great Plains' directed verdict motion and submitted the case to the jury, which returned a

$14,134.06 verdict for Pugh on his first cause of action (lenders' security programs) and also returned a verdict of $14,642 for Pugh on the cause of action relative to the ALCO warranty coverage. The court also denied Great Plains' motion for judgment notwithstanding the verdict for Pugh on his second cause of action.

DENIAL OF DIRECTED VERDICT AND JUDGMENT N.O.V.

Referring to Pugh's second cause of action, which is based on the ALCO transaction, Great Plains argues that ALCO's payment of $60,000 was a "cancellation fee" and, therefore, outside operation of the agreement with Pugh for a commission concerning ALCO's warranty coverage. If Great Plains' argument is correct, the district court should have directed a verdict against Pugh and dismissed his second cause of action or entered a judgment notwithstanding the verdict for Pugh on that cause of action.

Pugh was entitled to a 5-percent commission on payments which Great Plains received from ALCO if the payments were based on extended warranty coverage sold by ALCO to its customers. Thus, the crucial question is whether ALCO's payments were based on warranty coverage issued to ALCO's customers or whether the payments from ALCO were a "cancellation fee," which, as far as we can ascertain, resembles ALCO's buying its way out of the Great Plains contract in the face of assertions that ALCO had breached the contract. Nothing in the record indicates that "cancellation fee" constitutes words of art or some type of technical jargon or that the phrase has any particular meaning supplied by any contract related to the litigation. Placed in the context of the course of dealings between ALCO and Great Plains, the $60,000 was paid by ALCO after ALCO's delivery of a $193,213 check for premiums collected on extended warranty coverage. However, the check, according to ALCO, would not be honored if deposited by Great Plains. In view of the problem concerning the check for premiums from ALCO's warranty coverage, Great Plains' demands for payment from ALCO contain specific reference to the "first dollar of premium" to be

remitted to Great Plains for the extended warranty coverage and "ALCO's retention of insurance premiums due and owing to Great Plains" for that coverage. Therefore, the evidence was susceptible to a finding that Great Plains' claim against ALCO was based on premiums which ALCO had collected for its warranty coverage, but initially failed to remit to Great Plains. In that setting, the evidence presented a submissible issue for the jury, namely, whether payments of ALCO were actually payments relative to premiums due for warranty coverage on ALCO's products. Consequently, the district court properly denied Great Plains' directed verdict motion and request for judgment n.o.v.

CHALLENGE TO INSTRUCTION NO. 4

Great Plains challenges instruction No. 4, which, in essence, required a jury's finding that Pugh and Great Plains had but one agency agreement for lenders' security programs at First National and U.S. National, before Pugh was entitled to any recovery. Great Plains argues that the jury could have concluded that an agency agreement pertained only to First National and not to U.S. National; therefore, instruction No. 4 prejudiced Great Plains by not permitting the jury to consider existence of separate agreements.

"In an appeal based on the claim of an erroneous instruction, the appellant has the burden to show that the questioned instruction was prejudicial or otherwise adversely affected a substantial right of the appellant." *Rose v. City of Lincoln*, 234 Neb. 67, 74, 449 N.W.2d 522, 528 (1989). Accord *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. 1, 459 N.W.2d 178 (1990).

We agree with Great Plains that instruction No. 4 is potentially prejudicial. However, the detriment was directed toward Pugh, not Great Plains. According to instruction No. 4, for Pugh's recovery the jury had to find existence of an agency agreement between Great Plains and Pugh which involved insurance programs for both U.S. National and First National. Thus, instruction No. 4 required that Pugh produce evidence sufficient to establish existence of a solitary agreement which necessarily included lenders' security programs at both banks.

Absence of proof that there was a solitary agreement for dual programs defeated Pugh's recovery. Great Plains has failed to show that prejudice to Great Plains resulted from instruction No. 4.

PREJUDGMENT INTEREST

Pugh cross-appeals and contends that the district court erred by refusing to assess prejudgment interest as the result of his verdicts against Great Plains. Since Pugh's causes of action accrued before January 1, 1987, Neb. Rev. Stat. § 45-103.02 (Reissue 1988) and its requirement of an "offer of settlement" as a prerequisite for prejudgment interest are inapplicable in Pugh's case. For that reason, we look to Nebraska law existing before January 1, 1987, relative to allowance of prejudgment interest.

" 'Prejudgment interest is allowed where the amount of the claim is liquidated. When reasonable controversy exists concerning the claimant's right to recover or the amount of such recovery, the claim is unliquidated, and prejudgment interest is not allowed. . . .' " *Knox v. Cook*, 233 Neb. 387, 394, 446 N.W.2d 1, 5 (1989). The amount of a claim is liquidated when the evidence furnishes a basis to compute an exact amount determinable without opinion or discretion inherent in the factfinding process. *Fletcher v. Mathew*, 233 Neb. 853, 448 N.W.2d 576 (1989).

First Cause of Action.

The evidence clearly establishes that Rips, as Great Plains' chief executive officer, not only had authority to bind Great Plains to the agency contract with Pugh, but also acknowledged that Pugh's agency agreement specified a 10-percent commission on premiums derived from the lenders' security programs at the banks. Accordingly, there was no reasonable controversy concerning Great Plains' obligation to pay a commission to Pugh. Moreover, Pugh and Great Plains stipulated that Great Plains received $141,340.61 in premiums derived from the lenders' security programs at the banks. Since Pugh's first cause of action was based on a liquidated claim and no reasonable controversy existed between Pugh and Great Plains regarding premiums or commissions pertaining to the

lenders' security programs, Pugh is entitled as a matter of law, in accordance with Neb. Rev. Stat. § 45-104 (Reissue 1988), to prejudgment interest at the rate of 12 percent per annum from March 31, 1985, the date stipulated for determining the total premium from the lenders' security programs.

Second Cause of Action.

Regarding the payments from ALCO, Great Plains did not contest the existence of the agency agreement with Pugh, which provided a 5-percent commission on the total premiums received from ALCO. However, there was a dispute about the nature of the payments which Great Plains received from ALCO. Were the payments actually premiums for ALCO's extended warranty coverage, as Pugh contended, or a "cancellation fee," as Great Plains contended? Existence of the dispute, which necessitated resolution by the jury's factfinding, precluded assessment of prejudgment interest. Hence, the district court correctly declined to assess prejudgment interest on the amount recovered as a result of Pugh's second cause of action.

CONCLUSION

We affirm the judgments of the district court, except we modify the judgment on Pugh's first cause of action; that is, the sum of $14,134.06, recovered under Pugh's first cause of action, bears interest at the rate of 12 percent per annum from March 31, 1985.

AFFIRMED AS MODIFIED.

JAIME ALAN FARR, APPELLEE, V. NANCY CHERYL NEWTON, FORMERLY KNOWN AS NANCY CHERYL FARR, APPELLANT.

474 N.W.2d 683

Filed September 27, 1991. No. 90-631.

1. **Modification of Decree: Child Custody.** A decree of dissolution awarding custody of a minor child will not be modified unless there has been a change of circumstances showing that the custodial parent is unfit or that the best interests

of the child require such action.

2. **Modification of Decree: Appeal and Error.** The determination as to modification of a dissolution decree is a matter of discretion for the trial court, and its decision will be reviewed on appeal de novo on the record and will be reversed upon an abuse of discretion.
3. **Trial: Appeal and Error.** An abuse of discretion takes place when a trial court's ruling is untenable such that it deprives a party of a substantial right and just result.
4. **Modification of Decree: Child Custody.** When a party obtains a divorce by default and facts existing at the time of the decree that affect the custody and best interests of the children are not called to the attention of the court, upon proper motion for modification, the trial court, in its discretion, may consider such facts in determining whether a change in circumstances has occurred.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Remanded with directions.

Michael N. Schirber, of Schirber Law Offices, P.C., for appellant.

Michael B. Kratville, of Kratville Law Offices, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The respondent, Nancy Cheryl Newton, formerly known as Nancy Cheryl Farr, has appealed from the June 7, 1990, order of the district court denying her application to modify the decree dissolving the marriage of the parties so as to give her custody of their minor child.

The parties were divorced on September 16, 1988. The decree placed custody of the parties' minor child, Alex Reno Farr, who was born on November 13, 1985, with the petitioner, Jaime Alan Farr. The respondent was to have visitation with Alex as the parties mutually agreed, but if the parties were unable to agree on visitation, a specific schedule was set forth in the decree.

On October 17, 1989, the respondent filed an application to modify the decree, requesting custody of Alex and child support. The matter was heard on April 26, 1990.

At the hearing, the respondent attempted to present evidence regarding her fitness as a parent at the time of the decree. The

petitioner's objections to that evidence were sustained. The respondent offered to prove that at the time of the decree, the reasons the parties agreed to the petitioner's custody of Alex were that the respondent was abusing alcohol, staying out late, and being unfaithful to the petitioner.

The respondent testified that at the time of the decree, she was not represented by legal counsel, was not employed, and did not have a permanent place of residence. Following the divorce, the respondent lived in Idaho until she moved to Lowville, New York, in February 1989. She has been employed in Lowville as an office worker for a car dealership since March 1989. She was earning $240 a week gross at the time of the hearing.

In May 1989, the respondent remarried. Her husband works at a paper mill, and in 1989, the couple had a joint adjusted gross income of approximately $33,000.

The respondent and her husband live in a two-bedroom apartment. There is an elementary school within walking distance, and there are children in the neighborhood with whom Alex can play. While the respondent is at work, her husband or his mother cares for Alex.

In February 1989, the petitioner had suggested the respondent should take custody of Alex because he did not have enough time to spend with Alex. The petitioner was planning to attend graduate school and thought it would be a good idea if Alex lived with the respondent during the school year and visited with him during the summer. The petitioner suggested they have an attorney draw up papers changing custody and that they split the attorney fees.

In August 1989, the petitioner informed the respondent he was voluntarily separating from the U.S. Air Force and wanted the respondent to take Alex for the summer because of her good job and nice home. The petitioner was having a difficult time supporting Alex and felt guilty because he was not able to spend time with Alex, and he knew the situation would deteriorate when he started attending graduate school full time.

In September 1989, the petitioner changed his mind about sending Alex to live with the respondent because petitioner was concerned his father would turn his back on him if he gave up

custody.

After the respondent filed her application to modify custody, the petitioner interfered with prearranged visitation rights. The respondent was compelled to file a motion for visitation, and the trial court granted the respondent's motion, allowing her the 10-week period previously agreed to by the parties.

The respondent presented a variety of witnesses who testified that she and Alex have a warm and loving relationship. No witness had seen the respondent abuse alcohol or drugs, and the respondent testified that she no longer has the problems that she had when she agreed to the petitioner's custody of Alex in September 1988.

From the entry of the decree to the time of the hearing, the petitioner had possession of Alex 44 weeks, the respondent had possession of Alex 31 weeks, and the petitioner's father had possession of Alex 7 weeks. During the extensive periods of time the respondent had possession of Alex, the petitioner vacationed outside the country and made two trips to Colorado to ski.

The petitioner testified that after the divorce, he worked full time in the Air Force and attended college full time, too. He graduated from college in December 1989 with a B.S. degree in biology from the University of Nebraska at Omaha. He was scheduled to separate from the Air Force on May 28, 1990, and planned to move to Oregon for the summer and then move to College Station, Texas, to attend a graduate program in veterinary science at Texas A & M University on a full-time basis. He would be receiving a minimum of $10,000 in grants and would not be employed full time. He planned to have Alex in day care while he attended classes.

The petitioner and Alex spend time outside playing when the weather permits. Petitioner expects to have more time for activities such as attending the zoo or a football game when he moves to Texas.

Tom Haley, a licensed psychologist who has known Alex since his birth, testified on behalf of the petitioner. He testified that the petitioner and Alex have a strong, positive relationship and that Alex would be "devastated" by a change of custody. Haley was impressed with the petitioner's method of

disciplining Alex.

Haley had not evaluated Alex professionally. His opinion was based on his personal observations.

Haley and the petitioner's mother work together. They have been friends for 5 years and are involved romantically and sexually.

Janet Rush, the respondent's sister, was called in rebuttal to Haley's testimony. She related an incident that occurred in November or December 1988 when she, the petitioner, and Alex were traveling from York, Nebraska, to Omaha. Alex was misbehaving, and the petitioner was driving. The petitioner told Alex to stop misbehaving or he would pull the car over. Alex continued to misbehave, and the petitioner threatened to leave the child on the side of the road.

The trial court found that there had not been a change in circumstances affecting Alex's best interests and left custody with the petitioner. The respondent was ordered to have possession of Alex for 3 months every summer. The trial judge made these findings on the record following the hearing and instructed petitioner's attorney to draft an order containing the judge's findings. He also instructed that the parties work something out regarding Christmas visitation; however, nothing regarding visitation at Christmas appears in the order of June 7, 1990.

The respondent has appealed from that order and has assigned as error the trial court's failure to allow her to present evidence regarding the circumstances of the parties existing at the time of the original decree; the trial court's finding there had not been a material change in circumstances affecting the best interests of Alex, and its denial of her application to modify; the trial court's failure to provide for holiday visitation; and the trial court's failure to award her reasonable attorney fees, court costs, and other incidental costs.

A decree of dissolution awarding custody of a minor child will not be modified unless there has been a change of circumstances showing that the custodial parent is unfit or that the best interests of the child require such action. *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990). The determination as to such modification is a matter of discretion

for the trial court, and its decision will be reviewed on appeal de novo on the record and will be reversed upon an abuse of discretion. *Id.* "An abuse of discretion takes place when the trial court's ruling is untenable such that it deprives a party of a substantial right and just result." *Brooke v. Brooke*, 234 Neb. 968, 971, 453 N.W.2d 438, 440 (1990).

When a party obtains a divorce by default and facts existing at the time of the decree that affect the custody and best interests of the children are not called to the attention of the court, upon proper motion for modification, the trial court, in its discretion, may consider such facts in determining whether a change in circumstances has occurred. *Buchele v. Tuel*, 204 Neb. 641, 284 N.W.2d 564 (1979). In this case, the respondent attempted to elicit testimony from the petitioner regarding her parental fitness at the time of the decree. When the petitioner's objection to the evidence was sustained, the respondent made an offer of proof as to the facts she wanted to introduce. Later in the hearing, she testified regarding some of those facts.

The judge who heard the application for the change of custody in this case was not the same judge who entered the decree of dissolution in 1988. As a result, there was no basis upon which to make a finding that there had been no material change in circumstances affecting the best interests of the child. However, the ruling preventing the respondent from presenting evidence concerning the circumstances existing at the time the marriage was dissolved does not require a reversal of the judgment and remand of the cause upon that ground.

The evidence which was received shows a material change in many of the circumstances affecting the best interests of the child.

The respondent testified without objection that at the time of the decree, she was unemployed and did not have a permanent residence. At the time of the hearing on the respondent's application to modify, the respondent had been employed with the same car dealership for over a year and was earning take-home pay of approximately $167 a week. The respondent had remarried and had maintained the same place of residence for over a year. The respondent was in a position to provide the kind of home for Alex that she had been unable to do at the time

of the decree.

There is also evidence that the petitioner's circumstances had changed, which would affect Alex's best interests. At the time of the decree, the petitioner was working full time and attending school on a full-time basis. At the time of the hearing, the petitioner had voluntarily quit his full-time employment to pursue a full-time course of graduate study in veterinary medicine. This also required the petitioner to make a move to Oregon for the summer and then to College Station, where his living arrangements and care for Alex were at best uncertain at the time of the hearing.

Furthermore, the petitioner had expressed on more than one occasion his ambivalence regarding his ability to retain custody of Alex. The petitioner's change of heart as to placing Alex with the respondent appears to have been a response to pressure from his own father. The petitioner had left Alex in the possession of the respondent or his father for several periods of extended visitation, which tended to indicate an inability or unwillingness to provide appropriate care for his son.

The facts of this case are somewhat similar to those in *Bartley v. Bartley*, 197 Neb. 246, 248 N.W.2d 39 (1976), where this court affirmed the trial court's modification of custody in that case from the mother to the father. In that case, there was evidence in support of the trial court's conclusion that there had been a change of circumstances affecting the child's best interests which showed that the mother had been ambivalent on occasion about wanting her child and that she was responding in some degree to family influence in her resistance to the change of custody. Also in the *Bartley* case, the father had remarried and his marriage appeared to be proceeding satisfactorily.

We conclude that considering the changed circumstances of both parties, it is in Alex's best interests that his custody be placed with the respondent. The respondent is able to provide a more stable home, a family environment, and care for Alex.

We also conclude that the trial court erred in failing to specify a Christmas visitation schedule. See *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987).

Because of the distance between the parties, Alex should be

in the possession of the respondent during the school year and with the petitioner during the summer vacation. The parties should alternate possession of the child for the Christmas holiday, the details of which shall be specified by the further order of the district court.

On February 22, 1990, the petitioner filed an application requesting that the respondent's child support obligation be increased. In the order dated June 7, 1990, the trial court ordered the respondent to pay $250 per month commencing October 1, 1990, for the months of October through May of each year. In view of our finding concerning the custody of the child, it is necessary to modify the order regarding child support. The modification should be made in view of the present circumstances of the parties, and for that reason we direct that an appropriate order be made by the trial court upon the remand of the cause.

The cause is remanded to the district court for further proceedings, with directions to modify the order of June 7, 1990, in conformity with this opinion.

All costs are taxed to the petitioner, and the respondent is allowed the sum of $1,000 for the services of her attorney in this court.

REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. WILLIAM R. BYAM, APPELLANT.

474 N.W.2d 688

Filed September 27, 1991. No. 90-691.

Convictions: Appeal and Error. In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence, such matters being for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Pursuant to verdict, defendant-appellant, William R. Byam, was adjudged guilty of robbery, in violation of Neb. Rev. Stat. § 28-324 (Reissue 1989). He assigns as error the failure of the district court to find the evidence insufficient to support the conviction. We affirm.

Section 28-324 provides, in relevant part, that one "commits robbery if, with the intent to steal, he . . . by putting in fear, takes from the person of another any money . . . ."

Byam, while in an intoxicated state, entered a fast-food restaurant at about 9:30 at night and announced that he was going to rob it. A customer said he did nothing at that time because he thought Byam was "just fooling around." Byam next declared that he was not joking and had a bomb outside, whereupon the customer, not knowing whether Byam spoke the truth, became frightened, picked up his food from the counter, and "went and sat down." According to the customer, Byam then "sat up on the counter . . . kicked his feet over, [and] stood up on the other side."

The assistant manager testified that the restaurant was busy when he noticed Byam sitting on the front counter. As the manager approached, Byam said, according to the manager's testimony, that he had planted a bomb and that there was a person across the street that would "blow the place up if he didn't get all the money, and that this was a robbery." The manager further testified that he took "a couple steps back from the counter," whereupon Byam "came across the counter and told me not to move or he'd rip my Adam's apple out." Byam said that he was serious, that he was not joking around, and that "if he didn't get all the money that the guy across the street would blow the place up." Believing Byam to be serious,

the manager became "pretty scared," confused, and unsure as to what he should do. As the manager and Byam walked into and through the lobby to get money from the safe, Byam repeated that he was not playing and that if he did not walk out of the restaurant, the place would get blown up. The manager put some money into a bag, zipped it, and gave it to Byam. As Byam left, he said, "See what drugs can do to you?"

Byam testified that on the day in question, after working and cashing his weekly paycheck, he ran an errand, went to a bar, and, being an alcoholic, got drunk. He testified he knows nothing of the events about which he heard at the trial.

A bar owner testified that at some time during the evening in question, he had asked Byam to leave the bar because Byam was being loud.

This case is controlled by the oft-repeated, but apparently not yet universally believed, rule that in determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence, such matters being for the finder of fact, whose findings must be sustianed if, taking the view most favorable to the State, there is sufficient evidence to support them. *State v. Laymon*, *ante* p. 80, 474 N.W.2d 458 (1991).

To argue under the state of the record in this case that because Byam displayed no weapon the jury could not reasonably conclude the manager was put in fear is, in a word, preposterous.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JEFFREY M. BLANK, APPELLANT.

474 N.W.2d 689

Filed September 27, 1991. No. 90-1037.

1. **Postconviction: Proof: Appeal and Error.** A defendant seeking postconviction relief has the burden of establishing the basis for such relief, and the findings of

the district court will not be disturbed unless they are clearly erroneous.

2. **Postconviction: Effectiveness of Counsel: Proof.** When the defendant in a postconviction proceeding alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. The defendant must also show that he was prejudiced in the defense of his case as a result of his attorney's actions or inactions.
3. _____: _____: _____. In a postconviction relief action, a showing of prejudice to the defense requires a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different.
4. **Effectiveness of Counsel: Words and Phrases.** A reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different is a probability sufficient to undermine confidence in the outcome.

Appeal from the District Court for Dakota County: ROBERT E. OTTE, Judge. Affirmed.

Robert B. Deck for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

In 1988, the appellant, Jeffrey M. Blank, was charged with being a felon in possession of a firearm and with being a habitual criminal. Pursuant to a plea bargain, the habitual criminal allegation was dismissed and Blank entered a plea of no contest to the charge of felon in possession. See Neb. Rev. Stat. § 28-1206 (Reissue 1989). Before the date set for sentencing, Blank discovered that Initiative 403 had been passed in November 1988 and the "right to bear arms" amendment to the Nebraska Constitution had been adopted. See *State v. Comeau*, 233 Neb. 907, 448 N.W.2d 595 (1989). Believing he had a defense to the charge based on Initiative 403, Blank filed a motion to withdraw his plea. The motion was overruled, and Blank was sentenced to a term of 16 to 54 months' imprisonment. The conviction and sentence were summarily affirmed on direct appeal. See *State v. Blank*, 234

Neb. xx (case No. 89-373, Dec. 14, 1989).

On July 2, 1990, Blank filed a petition for postconviction relief, pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1989), alleging his conviction and sentence were void or voidable because he did not receive effective assistance of counsel and because he was arrested and convicted on the basis of evidence obtained pursuant to an unconstitutional search and seizure. On July 24, 1990, the district court appointed legal counsel to represent Blank in this postconviction action. After a hearing on September 20, 1990, the district court dismissed Blank's petition, finding that there was no evidence trial counsel failed to perform at least as well as a lawyer of ordinary training and skill in the criminal law in the area and that there was no evidence Blank was prejudiced in the defense of his case as a result of his attorney's action or inaction or that, but for the ineffective assistance of counsel, there was a reasonable probability the result would have been different.

Blank has appealed to this court, contending the district court erred in overruling his petition (1) because he received ineffective assistance of counsel and (2) because the conviction and sentence were obtained in violation of U.S. Const. amends. IV, V, and VI and Neb. Const. art. I, §§ 3, 7, 11, and 12.

A defendant seeking postconviction relief has the burden of establishing the basis for such relief, and the findings of the district court will not be disturbed unless they are clearly erroneous. *State v. Keithley*, 238 Neb. 966, 473 N.W.2d 129 (1991); *State v. Whitmore*, 238 Neb. 125, 469 N.W.2d 527 (1991); *State v. Salas*, 237 Neb. 546, 466 N.W.2d 790 (1991); *State v. El-Tabech*, 234 Neb. 831, 453 N.W.2d 91 (1990); *State v. Jones*, 231 Neb. 110, 435 N.W.2d 650 (1989).

When the defendant in a postconviction proceeding alleges a violation of his constitutional right to effective assistance of counsel as a basis for relief, the standard for determining the propriety of the claim is whether the attorney, in representing the accused, performed at least as well as a lawyer with ordinary training and skill in the criminal law in the area. The defendant must also show that he was prejudiced in the defense of his case as a result of his attorney's actions or inactions. *State v. Britt*, 237 Neb. 163, 465 N.W.2d 466 (1991); *State v. El-Tabech*,

supra; *State v. Jones, supra*. A showing of prejudice to the defense requires a demonstration of reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *State v. Britt, supra*; *State v. Salas, supra*; *State v. El-Tabech, supra*; *State v. Jones, supra*. A reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different is a probability sufficient to undermine confidence in the outcome. *State v. Salas, supra*; *State v. El-Tabech, supra*; *State v. Jones, supra*.

The record shows that Blank was initially incarcerated in the Dakota County jail on August 29, 1988, on two misdemeanor charges. On the morning of August 31, the janitor from the jail asked Dakota County Sheriff James Wagner about the ownership of a green 1971 Pontiac LeMans automobile that had been in the parking lot for several days. The janitor was concerned because the owner of the vehicle could not be identified, and he intended to tow it away.

After the discussion with the janitor, Sheriff Wagner was contacted by two police detectives from Sioux City, Iowa. The detectives told Wagner that they had information there was stolen property in the Pontiac and wanted to obtain a search warrant. A search warrant was issued for the vehicle. Meanwhile, following up on the janitor's request, Deputy Glen Sedivy asked Blank if the Pontiac belonged to him, and Blank indicated that it was his car.

Sheriff Wagner took a set of car keys from Blank's possession locker at the jail. The keys fit the doors to the Pontiac. At this time, Wagner saw that the Pontiac had a California license plate fitted over another license plate. He removed the California plate, discovered a Nebraska plate underneath, and determined that the Nebraska license plate was registered to Rhonda or Jeffrey Blank.

During the search of the automobile, several items were seized and turned over to the Sioux City, Iowa, authorities. Sheriff Wagner also confiscated a sawed-off shotgun that he found wrapped in a towel in the trunk of the Pontiac.

Bond had been set on the misdemeanor charges. Two women came to bond Blank out of jail between 1:30 and 2:30 p.m. on

August 31, 1988, but were told that they had to wait. Approximately 45 minutes to 1 hour later, the women were told that new charges had been filed against Blank and that he could not be bonded out of jail.

On September 1, 1988, Blank was charged with being a felon in possession of a firearm and with being a habitual criminal. The next day, Randy Hisey, an attorney with 12 years' experience in criminal defense work, was appointed to represent Blank. After a preliminary hearing held September 30, 1988, Blank was bound over to the district court and was arraigned in the district court on October 11, 1988.

Hisey testified at the postconviction hearing that Blank was a demanding client and that Hisey was required to make very few judgment calls because Blank "called virtually all the shots in the course of the representation" and was very much in control of the defense. The record shows that Hisey filed numerous pretrial motions on Blank's behalf, including an application to use the law library; an application to return Blank to the Dakota County jail from the Diagnostic and Evaluation Center in Lincoln; a motion for the return of the 1971 Pontiac LeMans automobile seized in connection with the execution of the search warrant on August 31, 1988; a motion to receive medical care from his personal physician in Sioux City, Iowa; a motion for jail privileges; two motions to suppress evidence seized during the search warrant execution on August 31, 1988; several motions for bond reduction; motions to produce defendant's statements, for discovery and inspection of documents, and for leave to take depositions; a motion to secure witnesses from without the state; an application to disclose an informant's identity; an application for the appointment of an additional attorney; and an application for transfer back to the Diagnostic and Evaluation Center in Lincoln.

The felony charges were originally scheduled for trial to a jury on December 6, 1988. Blank's discovery motions were sustained on November 15, 1988. During a suppression hearing also held on November 15, the court considered Blank's arguments that the search warrant for his vehicle was obtained in violation of the U.S. and Nebraska Constitutions. The

matter was taken under advisement. The court heard further argument and on December 1, 1988, overruled Blank's motions to suppress evidence.

Meanwhile, Hisey had entered into plea negotiations on Blank's behalf, seeking mainly to have the habitual criminal charge dismissed. According to Hisey, the possibility of sentence enhancement under the habitual criminal statute was one of Blank's major concerns.

On December 21, 1988, the parties filed a plea agreement in which Blank agreed to plead no contest to possession of a firearm by a felon. After pleading no contest, Blank would be transported to the Diagnostic and Evaluation Center in Lincoln. Pursuant to the agreement, each party was free to argue recommendations at the sentencing. After the lapse of the appeal time, the State was to dismiss all charges pending against Blank, including habitual offender allegations. The State also agreed not to file any potential charges of which the State had knowledge as of the date of the plea agreement and agreed to recommend that Blank receive credit for time served since August 29, 1988. In turn, Blank agreed to dismiss a civil case he filed in federal court against the Dakota County sheriff and promised not to file any action against other Dakota County employees as a result of these charges, the search of his vehicle, the investigation, his incarceration in the Dakota County jail, or anything else which might have accrued as of the date of the plea agreement. Finally, the State agreed to release Blank's 1971 Pontiac after removing any contraband or stolen property.

The court accepted Blank's plea of no contest on December 21, 1988, and scheduled a sentencing hearing for February 14, 1989. On February 10, 1989, Hisey filed a "Motion to Dismiss or to Withdraw Plea of No Contest or to Arrest Judgment" on Blank's behalf, contending that § 28-1206 was unconstitutional under Neb. Const. art. I, § 1, as amended by Initiative 403 on November 8, 1988, and that in light of Initiative 403, Blank had a good defense to the charge. The motion was overruled, and Blank was sentenced to 16 to 54 months' imprisonment.

In this appeal, Blank contends Hisey did not effectively represent him because Hisey did not timely discover the passage of Initiative 403 and failed to determine its effect on the charge

against Blank. This argument is without merit. In *State v. Comeau*, 233 Neb. 907, 448 N.W.2d 595 (1989), we held that § 28-1206 was not invalid as in conflict with Neb. Const. art. I, § 1, as amended by Initiative 403. See, also, *State v. Harrington*, 236 Neb. 500, 461 N.W.2d 752 (1990). This holding eliminates any possibility of prejudice to Blank by virtue of the fact he did not know of the adoption of Initiative 403.

Blank also claims he received ineffective assistance of counsel because Hisey failed to obtain the search warrant and affidavit for search warrant to offer in evidence at the suppression hearings, and failed to determine whether those documents were included in the court file of which the district court took judicial notice. In this regard, Blank contends that "the Sheriff's Office (or other law enforcement officers) were taking the Defendant's personal belongings (i.e. car keys) without a warrant" and that the officers "probably" searched the vehicle before obtaining the warrant. Again, Blank fails to show how he was prejudiced by these alleged omissions. The warrant and affidavit referred to were not offered in evidence during the postconviction hearing and are not part of the record presented to this court.

Blank further contends Hisey performed ineffectively because he did not request rulings on "numerous motions," including a motion for psychiatric evaluation, before the plea and sentencing. Aside from the motion for psychiatric evaluation, Blank has not specified which of the "numerous motions" he feels would have influenced his decision to enter into the plea agreement. Apparently, the district court had not ruled on Blank's motion to secure witnesses from without the state or his motion to disclose the informant's identity. Hisey testified that he advised Blank that any pending motions would, in effect, become moot if Blank pled no contest. The record further shows that the court advised Blank at length about his rights pertaining to these matters before accepting the no contest plea. Specifically, the record shows that Blank understood that by pleading no contest he would waive his rights to confront his accusers and to subpoena witnesses in his defense. The record shows that Blank voluntarily waived these rights and that his contentions to the contrary are without

merit.

Hisey testified at the postconviction hearing that he filed a motion for psychiatric evaluation on December 9, 1988, at Blank's request, although Hisey never personally felt that Blank was irrational or that Blank needed a psychiatric evaluation. Hisey did not request a ruling on the motion because Blank wanted to proceed with the plea agreement. At the time the court accepted Blank's plea, Hisey told the court he believed Blank was making his plea voluntarily, knowingly, and intelligently. In accepting the plea, the court found that Blank fully understood his rights; that he was acting voluntarily; that he fully understood the nature of the charge against him, the consequences of his plea, and the penalty that could be imposed; and that the plea was made intelligently, voluntarily, and knowingly. Although Blank now contends he was irrational and confused when he entered the plea, the evidence shows otherwise.

Despite his assertions to the contrary, Blank has failed to demonstrate that his attorney failed to perform at least as well as a lawyer with ordinary training and skill in the criminal law in the area. Nor has Blank shown that he was prejudiced in the defense of his case as a result of his attorney's actions or inactions. His rights under the U.S. and Nebraska Constitutions were neither denied nor infringed so as to render his conviction void or voidable. The judgment of the district court is affirmed.

AFFIRMED.

VINCENT DESCIOSE, JR., APPELLANT, V. CHILES, HEIDER & CO., INC., AND SHEARSON/AMERICAN EXPRESS, INC., APPELLEES.

476 N.W.2d 200

Filed October 4, 1991. No. 88-856.

1. **Limitations of Actions: Pleadings: Proof.** Where a petition does not disclose on its face that it is barred by the statute of limitations, a defendant must plead the statute as an affirmative defense, and, in that case, the defendant has the burden to prove that defense.

2. _____: _____: _____. Where a petition on its face shows that the cause of action stated therein is barred by the statute of limitations, the plaintiff must allege facts to avoid the bar of the statute and, at trial, has the burden to prove those facts.
3. **Brokers.** The mere existence of a broker-client relationship, without more, does not imply a confidential relationship.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Robert V. Dwyer, Jr., and Richard D. Cimino, of Dwyer, Pohren, Wood, Heavey & Grimm, for appellant.

Kathleen A. Jaudzemis, of Cline, Williams, Wright, Johnson & Oldfather, for appellees.

WHITE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, D.J., Retired.

GRANT, J.

This case involves only the question of the statute of limitations as applied to plaintiff's action against defendants. Pursuant to Neb. Rev. Stat. § 25-221 (Reissue 1989), the issue of the applicability of the statute of limitations to plaintiff's action was tried separately. Apparently, the parties and the trial court agreed that the issue should be tried to a jury. After trial, the jury answered certain questions submitted to it, and the court ordered certain parts of plaintiff's claims against defendants dismissed and retained one particular claim for trial. Plaintiff has appealed to this court.

On April 24, 1985, plaintiff-appellant, Vincent DeSciose, Jr., filed a petition against defendants-appellees, Chiles, Heider & Co., Inc., and Shearson/American Express, Inc. (hereinafter collectively referred to as defendant), seeking damages resulting from plaintiff's purchase of certain bonds and warrants of Sanitary and Improvement District (S.I.D.) No. 7 of Lancaster County through defendant. The petition sought damages of $287,888.09 plus interest.

The petition set out three "Causes of Action," identified as claims of negligence and fraud, controlled by a 4-year statute of limitations. The original petition set out the securities and dates

of purchase as follows:

Date of Purchase	Security	Amount
April 1, 1976	S.I.D. No. 7 bond	$100,000.00
October 28, 1980	S.I.D. No. 7 bond	100,000.00
October 13, 1981	S.I.D. No. 7 warrant	50,000.00
July 28, 1982	S.I.D. No. 7 warrant	26,424.43
November 24, 1983	S.I.D. No. 7 warrant	11,463.66

The warrant described as having been purchased on November 24, 1983, was not mentioned again in the subsequently filed petitions and is not considered herein except in a discussion of the confusion it apparently caused.

Defendant's answer admitted the status of the parties and the purchases and generally denied the other allegations of the petition. Among the affirmative defenses pled, defendant alleged that plaintiff's claims were barred by the statute of limitations.

Since the only issue before us is the effect of the statute of limitations on plaintiff's claims, the effect of the statute as to the original petition must be considered. Examination of the original petition shows that of the five transactions set out, only two arose more than 4 years before the filing of the petition. As stated above, the petition was filed on April 24, 1985. If a 4-year statute of limitations is applied, it is clear than any transaction after April 23, 1981, is not affected. That means that the transactions of October 13, 1981, and July 28, 1982, are not subject to dismissal pursuant to a 4-year statute of limitations. (We are not concerned with the November 24, 1983, transaction for the reason set out above.) The original petition, on its face, showed that the 4-year statute of limitations had run on the other two claims, and since the statute might be tolled under certain circumstances, the dispositive question as to those two claims was, When was defendant's allegedly wrongful conduct discovered by plaintiff?

The trial court in its order of dismissal, later discussed, properly preserved the July 28, 1982, claim for further action, but did not so preserve the October 13, 1981, claim. As discussed below, that action was the only error committed by the trial court. The court's judgment is therefore affirmed in part and reversed in part.

Further petitions were filed expanding the scope and number of the challenged transactions between plaintiff and defendant. In an amended petition filed September 2, 1986, the allegations were amended to delete references to the November 24, 1983, warrant purchase and to restate the other S.I.D. No. 7 bond and warrant purchases alleged in the original petition except to allege two $50,000 bonds purchased on October 28, 1980, rather than one $100,000 bond. In the "Fourth Cause of Action" and the "Fifth Cause of Action" set out in this amended petition, plaintiff added failure of consideration and the violation of Neb. Rev. Stat. § 8-1118 (Reissue 1987) to the theories of recovery, in connection with the single S.I.D. No. 7 bond purchased on July 28, 1982.

Additionally, in that amended petition, plaintiff added claims concerning other securities purchased in S.I.D. No. 290 of Douglas County, S.I.D. No. 65 of Sarpy County, and S.I.D. No. 103 of Sarpy County, as follows:

Date of Purchase	Security	Amount
May 12, 1980	S.I.D. No. 290 warrant	$ 1,680.50
May 27, 1980	S.I.D. No. 290 warrant	39,819.00
July 1, 1980	S.I.D. No. 290 warrant	25,000.00
April 23, 1974	S.I.D. No. 65 warrant	10,000.00
November 30, 1978	S.I.D. No. 103 warrant	233.40
November 30, 1978	S.I.D. No. 103 warrant	14,694.77
November 30, 1978	S.I.D. No. 103 warrant	8,411.39
December 19, 1978	S.I.D. No. 103 warrant	80,040.05
September 28, 1979	S.I.D. No. 103 warrant	100,000.00

Plaintiff's second amended petition (the operative petition on which the case was tried) was filed on July 10, 1987. This second amended petition was identical to the amended petition, but added allegations that four bonds of S.I.D. No. 103 with a total value of $140,000 were purchased on May 1, 1980, and that recovery of the value of those bonds was also sought under the "First Cause of Action" (false representations), "Second Cause of Action" (violation of fiduciary relationship), and "Third Cause of Action" (negligence).

The operative second amended petition, in the first 11 paragraphs (numbered I through XI), described as "General Allegations," sets out the following: Plaintiff is a resident of

Omaha, Douglas County, Nebraska. Defendant Chiles, Heider & Co., Inc., is a Nebraska corporation engaged in the business of serving as a stockbroker and investment advisor. Defendant Shearson/American Express, Inc., is a Delaware corporation which in 1983 acquired all the common stock of Chiles, Heider. No issue is presented on this joinder of defendants. All actions herein referred to as done by "defendant" were done before 1983 and were done by Chiles, Heider alone.

The operative petition further alleged that from and after July 24, 1972, defendant maintained an investment securities account for plaintiff and that defendant, "[p]rior to the opening of Plaintiff's investment securities account, and on several occasions thereafter," made certain representations to plaintiff as to defendant's expertise in Nebraska sanitary and improvement districts and as to the financial safety and attractiveness of S.I.D. bonds and warrants.

The petition then alleged, in paragraph VI, that plaintiff purchased from defendant three bonds and two warrants issued by S.I.D. No. 7 of Lancaster County, Nebraska (one bond on April 1, 1976, two bonds on October 28, 1980, one warrant on October 13, 1981, and one warrant on July 28, 1982), in the total principal amount of $276,424.43.

Plaintiff alleged, in paragraph VII, that he purchased three warrants issued by S.I.D. No. 290 of Douglas County (one on each of three different dates in 1980) in the total principal amount of $66,499.50. In paragraph VIII, plaintiff alleged that on April 23, 1974, he purchased one warrant issued by S.I.D. No. 65 of Sarpy County in the amount of $10,000. Plaintiff then alleged, in paragraph IX, that he purchased five warrants of S.I.D. No. 103 of Sarpy County (three on November 30, 1978, one on December 19, 1978, and one on September 28, 1979) and that he purchased four S.I.D. No. 103 bonds on May 1, 1980. These securities were purchased for a total of $343,369.61, although plaintiff's petition erroneously states the total amount to be $203,369.61. The petition then alleged that defendant was fiscal agent or cofiscal agent for each of the S.I.D.'s mentioned above and that none of the obligations had been paid, although some had matured.

The petition then goes on to set out a "First Cause of Action"

in five paragraphs (numbered XII to XV, including XIII-A), the first of which incorporates by reference all of the "General Allegations" set out above. In this part of the operative petition, plaintiff alleged that defendant made false representations of fact or concealed facts from plaintiff and that plaintiff relied on defendant's misrepresentations and purchased the bonds and warrants "described in Paragraphs VI through IX" (which represented all of plaintiff's purchases set out in his operative petition). Plaintiff then alleged he did not discover that the representations were false and fraudulent or that facts had been concealed from him until December 1982. Plaintiff alleged he suffered a loss of $696,293.54, plus interest of $257,406.77, because "said securities are worthless." In this "cause of action," plaintiff prayed for $696,293.54, plus interest.

In his "Second Cause of Action," plaintiff again incorporated the general allegations plus paragraph XV (the allegation that he had not discovered the falsity and concealment of facts until December 1982). He then alleged that defendant failed to disclose to him that defendant was the fiscal agent or cofiscal agent for each of the S.I.D.'s and that defendant told him all the investments were sound and did not tell him of all the facts concerning the various districts. Plaintiff then alleged that this failure of defendant "to speak truthfully as to the bonds and warrants" operated "as a constructive fraud" on plaintiff. In this "cause of action," plaintiff prayed for damages in the identical amount set out in the "First Cause of Action."

In his "Third Cause of Action" (consisting of paragraphs XX through XXII), plaintiff again incorporated the "General Allegations" plus paragraphs XV and XVII (setting out the allegations of facts allegedly not disclosed to plaintiff). Plaintiff then alleged that defendant was negligent in certain respects and breached its duty to plaintiff. Plaintiff again prayed for damages in the identical amount set out in the "First Cause of Action" and the "Second Cause of Action."

In his "Fourth Cause of Action," plaintiff alleged that there was a failure of consideration as to the S.I.D. No. 7 warrant purchased on July 28, 1982, because at the time of purchase

that warrant was worthless or worth substantially less than the $26,424.43 plaintiff paid. In this "cause of action," plaintiff prayed for damages of $26,424.43, "together with prejudgment interest." This amount is included within the sums earlier prayed for.

In his "Fifth Cause of Action," plaintiff alleged that he was damaged in the amount of $26,424.43, because at the time he purchased the S.I.D. No. 7 warrant in July 1982, defendant "knew that S.I.D. No. 7 was experiencing significant financial difficulties," and the defendant violated "Neb. Rev. Stat. §8-1118, R.R.S. (1943)." In this part of his pleading, plaintiff made a tender of the warrant of July 28, 1982, as well as all the warrants "he may have received in payment of interest due on this security from SID No. 7." Plaintiff then requested an attorney fee, pursuant to § 8-1118.

Defendant's answer to the second amended petition alleged and admitted the sales of bonds and warrants as described by plaintiff; generally denied plaintiff's other allegations; and alleged various affirmative defenses, including that "plaintiff's claim and causes of action are barred by the applicable statutes of limitations." Plaintiff's reply denied the allegations of the answer.

As stated above, the issue of the defense relating to the statute of limitations was tried separately. After trial, the jury returned its verdict, consisting of the answers to two questions submitted to the jury by the court:

> 1. Did the plaintiff discover the fraud or misrepresentation he alleges as to all of the bonds and warrants of SID No. 7 of Lancaster County, Nebraska, (except one of the two bonds sold 11/5/80) on or before April 23, 1981 [4 years before the date of the filing of plaintiff's original petition]?
>
> 2. Did the plaintiff discover the fraud or misrepresentation he alleges as to all of the warrants of SID No. 290 of Douglas County, Nebraska, the warrant of SID No. 65 of Sarpy County, Nebraska, and all of the warrants of SID No. 103 of Sarpy County, Nebraska, on or before September 1, 1982, [4 years before the filing of plaintiff's amended petition]?

The jury answered each question "yes." The trial court accepted the verdict and on September 15, 1987, made the following docket entry:

> Pursuant to verdict, ordered, that plaintiff's petition be and the same is hereby dismissed as to all claims in his first and second causes of action except the warrant issued by SID No. 7 of Lancaster County purchased by plaintiff on July 28, 1982 and bonds issued by SID No. 103 of Sarpy County, Nebraska, purchased by plaintiff on May 1, 1980.
>
> By way of ruling on prior motions of defendants, it is further ordered that plaintiff's petition is dismissed as to the first and second causes of action as to bonds issued by SID No. 103 of Sarpy County, Nebraska, purchased by plaintiff on May 1, 1980. It is further ordered that plaintiff's petition is dismissed as [sic] the third and fifth causes of action.

Plaintiff timely appealed, assigning as errors to this court: (1) The trial court erred in giving instructions Nos. 6 and 8; (2) the trial court erred in not instructing the jury that defendant was the agent of plaintiff, with a fiduciary duty to plaintiff in certain specific areas; and (3) the trial court erred in dismissing, in part, plaintiff's first and second causes of action and plaintiff's third and fifth causes of action because "these causes of action contained an issue of material fact with respect to fraudulent concealment to be decided by the jury, and about which the trial judge failed to instruct."

We first note that the five "causes of action" set out in plaintiff's operative petition are not separate causes of action. The petition alleges 18 transactions on 12 different days. The first "cause of action" seeks recovery of $696,293.54, representing the total amount of the 18 transactions, on the theory of fraud; the second seeks the recovery of the same amount on the theory of violation of a fiduciary duty; the third seeks the same amount on the theory of negligence; the fourth seeks the recovery of $26,424.43 on the theory there was a failure of consideration with respect to one warrant in S.I.D. No. 7; and the fifth seeks recovery of the same amount, $26,424.43, with respect to the same warrant because of a violation of § 8-1118. The petition really seeks recovery of a

total amount on three different theories of law plus recovery of a certain part of the amount based on two additional theories. This pleading approach resulted in some degree of chaos both in the trial and in the analysis on review. We specifically do not approve of the form of the pleadings to submit this case, but we will treat the case in the manner it was submitted by the parties and tried to the court. See, *Brown v. Clayton Brokerage Co.*, 238 Neb. 646, 472 N.W.2d 381 (1991); *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991).

First of all, it is important to note that plaintiff does not challenge the sufficiency of the evidence to support the jury findings on the statute of limitations questions.

Examination of the petitions shows that except for the S.I.D. No. 7 warrants purchased on October 13, 1981, and July 28, 1982 (purchased within 4 years of the filing of the original petition) all of plaintiff's purchases were made more than 4 years before the filing of the petitions in which such purchases are first mentioned. Since the statute of limitations had run as to all of plaintiff's purchases from defendant except the two described above, the dispositive question is whether and when the statute was tolled by defendant's conduct as to those other transactions.

Plaintiff's five theories of recovery, identified as "causes of action," may be summarized as follows:

1. Fraudulent misrepresentation: Plaintiff alleges, in regard to all of the above transactions, that he relied on the defendant's false representations of fact or concealed facts and that he did not discover the false and fraudulent or concealed facts until December 1982. He prays for the principal amount of $696,293.54, plus interest of $257,406.77, because "the securities are worthless."

2. Breach of Fiduciary Duty: Plaintiff alleges that the defendant failed to disclose its status as fiscal or cofiscal agent of the various S.I.D.'s, told him that all of his investments were sound, and did not tell him all the facts regarding the various districts, which resulted in constructive fraud upon the plaintiff, and that plaintiff had not discovered that fraud until a time within 4 years of the filing of his various petitions. Again the plaintiff prayed for $696,293.54.

3. Negligence: Plaintiff alleges that defendant was negligent and breached its duty to the plaintiff as to all of the above transactions, again resulting in $696,293.54 worth of harm to the plaintiff.

4. Failure of Consideration: This theory incorporates only those allegations pertaining to S.I.D. No. 7 in Lancaster County, stating that the warrant he purchased on July 28, 1982, lacked consideration because it was worthless at the time, or worth substantially less than the $26,424.43 the plaintiff paid.

5. Securities Fraud: Referring to the same allegations regarding S.I.D. No. 7, plaintiff alleges that the defendant knew that S.I.D. No. 7 was experiencing significant financial difficulties and that it had violated § 8-1118. The plaintiff then tendered the warrant dated July 28, 1982, "as well as all other warrants he may have received in payment of interest due" on the warrant, asking for interest and reasonable attorney fees.

Plaintiff first contends that the trial court erred in instructing the jury in instruction No. 6 that "[t]he plaintiff has the burden of proof by a preponderance of the evidence that he did not discover the fraud or misrepresentation until at a time within four years of his bringing suit as to the bonds and warrants involved." In support of his position, plaintiff cites *League v. Vanice*, 221 Neb. 34, 42, 374 N.W.2d 849, 854 (1985), where we stated, "A defendant alleging the statute of limitations as an affirmative defense has the burden to prove such defense." Instruction No. 8 defines the burden of proof, and the two challenged instructions will be considered together.

Defendant responds that, as set out in *S.I.D. No. 145 v. Nye*, 216 Neb. 354, 355, 343 N.W.2d 753, 754 (1984), "[i]f a petitioner alleges a cause of action ostensively barred by the statute of limitations, such petition, in order to state a cause of action, must show some excuse tolling the operation and bar of the statute." To the same effect see *Jones v. Johnson v. Pullen*, 207 Neb. 706, 300 N.W.2d 816 (1981), and *George P. Rose Sodding & Grading Co. v. Dennis*, 195 Neb. 221, 237 N.W.2d 418 (1976).

We feel the rule set out in *League v. Vanice, supra*, must be expanded to state that where a petition does not disclose on its face that it is barred by the statute of limitations, a defendant

must plead the statute as an affirmative defense, and, in that case, the defendant has the burden to prove that defense. If, however, the petition on its face shows that the cause of action is barred by the statute, the plaintiff must allege facts to avoid the bar of the statute of limitations and, at trial, has the burden to prove those facts.

As we stated in *In re Estate of Anderson*, 148 Neb. 436, 438, 27 N.W.2d 632, 634 (1947):

> It has long been the rule that: "In this state the statute of limitations is a statute of repose; it prevents recovery on stale demands. If the petition in an action sets forth facts which show upon its face that it is barred by statute, and in avoidance thereof further facts are alleged to remove the bar of the statute, all of which are positively denied by the answer, together with the added allegations that the cause of action is barred by the statute of limitations, the plaintiff cannot recover without first establishing the facts so alleged in avoidance."

In the case before us, plaintiff has set out facts which in themselves show the statute of limitations has run as to most of the claims in issue. Plaintiff properly then made allegations of fact showing, if proved, that the statute had been tolled. In that situation, the plaintiff must prove all the allegations of his petition in order to prove a case against defendant. The trial court did not err in placing the burden of proof on plaintiff in the circumstances of this case and thus did not err in submitting instructions Nos. 6 and 8 to the jury.

Plaintiff then contends that the trial court erred in not instructing the jury that defendant was an agent of plaintiff and that, as an agent, it had a fiduciary or confidential relationship with plaintiff and owed plaintiff certain duties. Plaintiff does not specifically allege that the trial court erred in not giving any of his requested instructions, but it appears that plaintiff is complaining of the trial court's refusal to give the following requested instruction:

> If you find that a confidential relationship of investment counselor and investor existed between Vincent DeSciose, Jr. and Fred Douglas, an employee of the Defendant, then you may find that the existence of

> such confidential relationship was such a circumstance which you may consider in determining what inquiry, if any, it would have been reasonable to expect.

We determine that the trial court properly refused the requested instruction. A fiduciary relationship "arises whenever confidence is reposed on one side, and domination and influence result on the other; the relation can be legal, social, domestic, or merely personal." Black's Law Dictionary 626 (6th ed. 1990).

The record does not set out any facts showing that such a relationship existed. The mere existence of a broker-client relationship, without more, does not imply a confidential relationship. *Fey v. Walston & Co., Inc.*, 493 F.2d 1036 (7th Cir. 1974); *Russo v. Bache Halsey Stuart Shields, Inc.*, 554 F. Supp. 613 (N.D. Ill. 1982). We are not faced with facts such as those in *Norris & Hirschberg v. Securities & Exchange Com'n*, 177 F.2d 228 (D.C. Cir. 1949), where many of the 50 customers who testified at trial did not know what a margin account was or that they were buying on margin, or such as those in *Charles Hughes & Co. v. Securities and Exchange Com'n*, 139 F.2d 434, 435 (2d Cir. 1943), where the "customers were almost entirely single women or widows who know little or nothing about securities or the devices of Wall Street."

In this case, plaintiff was an able, experienced businessman, who used his own independent judgment with respect to his investments. He established a Cessna distributorship in Omaha in 1955. He opened a different private aircraft distributorship in Long Beach, California, in 1969. In 1975, he sold the Cessna distributorship back to Cessna and opened a different distributorship. At the time of trial, he operated businesses selling aviation parts (including engines) in Omaha, Long Beach, and Oklahoma City, Oklahoma. Plaintiff did a great deal of business with defendant, but did substantial business with other securities firms. Plaintiff sold 52,200 shares of Cessna stock through other brokers. During one period of time while defendant's agent was offering investments to plaintiff, plaintiff was selling corporate airplanes to defendant.

Plaintiff testified that during the time from 1972 to 1982, when defendant's agent called him, plaintiff asked questions

about the S.I.D. as to which sales were proposed. Plaintiff testified that he "asked the most intelligent questions I could think of at the time." Plaintiff did complain that he received "[i]ncorrect answers," but defendant's testimony showed that all pertinent information either was given to plaintiff or was available to him in printed reports or brochures. A typical report set out the location of the S.I.D., its purpose, and the relationship of defendant to the S.I.D. as fiscal agent. Plaintiff testified as to a lack of knowledge in all these areas. The jury apparently believed defendant's evidence in this regard.

The trial court did not err in refusing plaintiff's tendered instructions and in refusing to instruct the jury on plaintiff's theory of a fiduciary relationship with defendant.

In plaintiff's third assignment of error, he contends:

> The trial court erred in dismissing in part the first and second causes of action of Appellant's Second Amended Petition, and Appellant's third and fifth causes of action, because these causes of action contained an issue of material fact with respect to fraudulent concealment to be decided by the jury, and about which the trial judge failed to instruct.

Plaintiff contends the court erred in this respect because "these causes of action contained an issue of material fact with respect to fraudulent concealment to be decided by the jury." The alleged errors arose when the court dismissed those "causes of action" on defendant's motions on those issues.

In connection with this assignment of error, we first consider the allegation concerning the third and fifth "causes of action." With regard to the fifth cause, concerning the applicability of § 8-1118 to plaintiff's purchase of an S.I.D. No. 7 warrant on July 28, 1982, for $26,424.43, it is clear that that section has a 2-year statute of limitations. As to defendant's motion for directed verdict on that issue, plaintiff's counsel told the court at the argument on the motion, "I think that is probably an appropriate motion. I don't know that we have any particular response. That is a flat statute of two years." Although error is assigned as to this issue, the assignment is not argued in plaintiff's brief, and we consider it no further. The trial court did not err in this respect.

The trial court apparently dismissed the third "cause of action," which sets out a theory of recovery based on negligence, on defendant's motion made at the conclusion of plaintiff's evidence, as follows:

> [Counsel for defendant]: Defendants would also move for a directed verdict on the third cause of action on Second Amended Petition. That cause of action alleges negligence in respect to all of the purchases that Mr. DeSciose has made from the defendants. There are 18 total purchases which are in issue, and the four-year common law statute of limitations provides no discovery period in the statute and there is no discovery period for this type of a claim of negligence provided in case law, and for that reason 16 out of the 18 purchases are barred by the statute of limitations.

The trial court stated that he was aware of two of them that "were in '82 and '83." The confusion engendered by the reference in the original petition to an S.I.D. No. 7 warrant purchased on November 24, 1983, apparently continued, although, as stated above, that factual allegation was omitted from all later filings. There is no reference in the operative petition to any purchases in 1983. Apparently, the court, at that time, was thinking of the October 13, 1981, purchase, which was not within the 4-year statute of limitations. Defendant again then specifically moved for directed verdicts on 16 of the claims of negligence. It is clear that defendant recognizes that two of plaintiff's claims are not barred by the statute—that is, the two claims concerning S.I.D. No. 7 warrants discussed above.

In its docket order entry of September 15, 1988, however, the trial court stated, in part, "It is further ordered that plaintiff's petition is dismissed as [sic] the third . . . [cause] of action." This order is in error as to two securities: the S.I.D. No. 7 warrants purchased October 13, 1981 ($50,000), and July 28, 1982 ($26,424.43). As stated above, the court was correct in excepting the S.I.D. No. 7 warrant of July 28, 1982, from its order of dismissal of the first two "causes of action" (that is, the claims based on fraud and fiduciary duty), and it erred in failing to except the purchase of the S.I.D. No. 7 warrant on

October 13, 1981, from the same dismissal. Plaintiff's assignment of error in this regard is valid to the extent described.

The trial court dismissed the third "cause of action" (the negligence theory) on defendant's motion. The reasons for this dismissal are not set out, but it is clear from the record that all of the negligence claims except the two S.I.D. No. 7 claims described in the preceding paragraph arose more than 4 years prior to the filing of the appropriate petitions, and unless the statute of limitations was somehow tolled, the statute would bar the actions. In determining that those negligence claims were barred, the trial court had the benefit of the jury's finding that the plaintiff had discovered the fraud or misrepresentation he alleged more than 4 years before the filing of the appropriate petitions. If the plaintiff had discovered facts about fraud and misrepresentation, those facts should also have led to the discovery of any negligence. The record shows that between July 1972 and July 1982, plaintiff had made approximately 209 purchases of various kinds, totaling, by plaintiff's evidence, $5,657,105.64 (of which $2,415,776.12 involved S.I.D. bonds and warrants). To contend that plaintiff knew nothing about these transactions except what defendant told him is to make a frivolous contention. To complain about 18 purchases out of approximately 209 over a 10-year period is to raise the concept of a "guaranteed return" to a new high.

Plaintiff then asserts that the court erred "in dismissing in part the first and second causes of action . . . ." The specifics of what is meant by dismissing "in part" are not set out, but apparently plaintiff has referred to the two S.I.D. No. 7 warrants described above. That matter has been determined. Insofar as plaintiff's alleged error in this regard concerns the bonds issued by S.I.D. No. 103 and purchased by plaintiff on May 1, 1980, the question as to the date of discovery of defendant's wrongdoing concerning the warrants in S.I.D. No. 103 was submitted in the second question to the jury, because the plaintiff's first amended petition, filed on September 2, 1986, sought recovery only for warrants issued by S.I.D. No. 103 between November 30, 1978, and September 28, 1979. As set out above, the jury's answer to the second question

submitted to it found that plaintiff had discovered the fraud or misrepresentation as to S.I.D. No. 103 warrants before September 2, 1982. In plaintiff's second amended petition, filed July 10, 1987, he sought recovery, for the first time, on S.I.D. No. 103 bonds which plaintiff had purchased on May 1, 1980. The trial court apparently held, as a matter of law, that if plaintiff had discovered fraud in S.I.D. No. 103 warrants before September 2, 1982, plaintiff had the chance to discover any fraud on S.I.D. No. 103 bonds 4 years before the filing of his petition on July 10, 1987. We agree. The evidence before the court is conclusive in that respect. The trial court did not err in dismissing plaintiff's claim as to S.I.D. No. 103 bonds.

The trial court did not err in any of the respects alleged by plaintiff except as to its dismissal of plaintiff's claim with regard to the S.I.D. No. 7 warrant purchased on October 13, 1981.

We note that the record presents various confusing facts that no one addresses. As an example, as mentioned above, the plaintiff's first petition sought recovery on a warrant issued by S.I.D. No. 7 on November 24, 1983. In plaintiff's first and second amended petitions no mention is made of this warrant. Nonetheless, at trial, in exhibit 6, plaintiff specifically offered a 17-page exhibit representing a warrant assigned to plaintiff from "Dain Bosworth Incorporated" on November 22, 1983. Defendant did not object to this offer. Similarly, the first question submitted to the jury refers to an exception, to wit, "except one of the two bonds sold 11/5/80." The two bonds referred to are apparently the two S.I.D. No. 7 bonds which plaintiff alleged were purchased on October 28, 1980. Defendant alleged the "11/5/80" date in its answer. The enigmatic reference to "one of the two bonds" is not questioned. Apparently the parties are aware of, and understand, all these items in the record. No one complains or explains.

In any event, the judgment of the trial court is affirmed in its entirety except as to its dismissal of plaintiff's claim arising out of his purchase of the S.I.D. No. 7 warrant on October 13, 1981. The cause is remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

HASTINGS, C.J., BOSLAUGH, and CAPORALE, JJ., not participating.

MARK A. PLOCK ET AL., APPELLEES AND CROSS-APPELLANTS, V. CROSSROADS JOINT VENTURE, AN INDIANA GENERAL PARTNERSHIP, APPELLANT AND CROSS-APPELLEE.

475 N.W.2d 105

Filed October 4, 1991. No. 89-113.

1. **Trial: Independent Contractor: Agents.** The determination of whether one is an independent contractor or an agent is properly one of fact to be determined after applying the appropriate standards.
2. **Appeal and Error.** In an appeal of an action at law, the Supreme Court does not reweigh the evidence; rather, the court considers the evidence in the light most favorable to the successful party, with conflicts resolved in favor of the successful party, who is entitled to the benefit of every inference which can reasonably be deduced from the evidence.
3. _____. The conclusion of the trial court in an action at law will not be set aside unless clearly wrong.
4. **Principal and Agent: Master and Servant: Negligence: Liability.** The law imputes to the principal or master responsibility for the negligent acts of his or her agent or servant done in obedience to the express orders or directions of the master, or within the scope of the employee's authority or employment in the master's business, and if those acts cause injury to third persons, the law holds the principal or master liable therefor.
5. **Employer and Employee: Master and Servant: Negligence: Liability.** For injuries caused by the negligent act of an employee not directed or ratified by the employer, the employee is liable because he or she committed the act which caused the injury, while the employer is liable, not as if the act had been done by the employer, but because of the doctrine of respondeat superior, the rule of law which holds the master responsible for the negligent act of his or her servant committed while the servant was acting within the master's business.
6. **Master and Servant: Negligence: Liability.** Unless the servant is liable, there can be no liability on the part of the master.
7. **Principal and Agent: Negligence: Liability.** The principal's liability, if any, is not that of a joint tort-feasor, but is derived solely from the liability of the agent, if any.
8. **Workers' Compensation.** The Nebraska Workers' Compensation Act is the employee's exclusive remedy against an employer for an injury arising out of and

in the course of employment.

9. **Torts: Liability: Releases.** In a situation where several persons are not actively joint tort-feasors but one person commits the tort and is primarily liable while the liability of the other person is derivative or secondary, as where it arises under the doctrine of respondeat superior, the releasor's acceptance of satisfaction from one discharges the other as well, as in the case of master and servant or principal and agent, and this is true despite an attempted reservation of rights against the person secondarily liable, since if the rule were otherwise, such person would be liable without having recourse against the person primarily liable, the latter having been released.
10. **Master and Servant: Negligence: Judgments: Liability.** Where the master is to respond to damages solely on account of his or her servant's negligence, a judgment dismissing the servant but holding the master liable is inconsistent.
11. **Principal and Agent: Claims.** A statute that bars a claim against an agent equally protects those on whose behalf he acted as agent.
12. **Principal and Agent: Workers' Compensation: Immunity: Releases.** The immunity of an agent as employer because of the release effected by the workers' compensation statutes releases the principal.
13. **Actions: Workers' Compensation: Proof: Pleadings: Waiver.** As a general rule, in a common-law action to recover damages for a work-related injury, the burden of proving the affirmative defense of the exclusivity of the Workers' Compensation Act is on the employer. Usually, the failure to plead the defense may result in the defense's being waived if not raised in time.
14. **Actions: Workers' Compensation: Proof.** There are several exceptions to the general rule that necessitates the affirmative proof of the defense of the exclusivity of the Workers' Compensation Act. The first exception is when the employer-employee relationship is shown in the plaintiff's petition. Another occurs when the plaintiff admits that the injuries arose in the course of employment. The final exception is the actual acceptance of compensation benefits.
15. **Actions: Jurisdiction.** The lack of jurisdiction of the subject matter may be raised at any time, and may be raised by the court sua sponte if necessary.
16. **Actions: Pleadings: Limitations of Actions: Workers' Compensation: Demurrer.** When it is apparent from its face that an action is barred by the statute of limitations or the exclusivity of the Workers' Compensation Act, the petition fails to state a cause of action and is subject to demurrer.
17. **Pleadings: Demurrer.** An answer which alleges that a petition fails to state a cause of action is in effect a demurrer.
18. **Invitor-Invitee: Negligence: Liability.** A possessor of land may be subject to liability for physical harm caused to invitees on its land if the possessor knows that a condition involves an unreasonable risk of harm, the possessor should expect that the invitees will not discover the danger or protect themselves against it, and the possessor fails to exercise reasonable care to protect against such danger.
19. **Invitor-Invitee: Negligence.** If the negligence of a possessor of land has made the invitee's exercise of a right or privilege impossible unless he or she exposes

himself or herself to a risk of bodily harm, the invitee may not be guilty of contributory negligence.

20. _____: _____. Where an invitee on land has no alternative route to that which he or she chooses, despite an apparent defect, it cannot be said that he or she is guilty of contributory negligence as a matter of law.
21. **Actions: Employer and Employee: Independent Contractor: Principal and Agent: Negligence.** Generally speaking, an employee of an independent contractor or agent who had knowledge of a defect in the premises would have no recourse against the owner-principal in possession of the premises.
22. **Directed Verdict.** Where the facts presented to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law and not submit it to a jury.
23. _____. In order to sustain a motion for directed verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion.
24. **Negligence.** A person must exercise ordinary care for his or her own safety, and this duty is commensurate with the danger to which he or she is exposed.
25. _____. A person who is capable of understanding and discretion and who fails to exercise ordinary care and prudence to avoid defects and dangers which are either open and obvious or are known to him or her is negligent or contributorily negligent.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Reversed and remanded with directions.

John R. Douglas, of Cassem, Tierney, Adams, Gotch & Douglas, for appellant.

William R. Johnson, Patricia A. Zieg, and James L. Schneider, of Kennedy, Holland, DeLacy & Svoboda, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

The defendant, Crossroads Joint Venture (CJV), an Indiana general partnership and owner of Crossroads Shopping Center (Crossroads) in Omaha, has appealed a jury verdict of $1,600,000 in favor of plaintiff Mark A. Plock (Plock) and one of $400,000 in favor of plaintiff Karen Plock, Plock's wife. Aetna Life & Casualty Company, the workers' compensation carrier for MS Management Associates, Inc. (MSM), Plock's employer, is also named as a plaintiff. The injuries which Plock

is alleged to have suffered are claimed to have been caused by Plock's stepping into an uncovered drain located on the floor of a tunnel under part of the Crossroads.

Crossroads was purchased by Crossroads Shopping Center Company Limited Partnership from The Brandeis Investment Company on August 31, 1983. CJV in turn acquired the premises on April 27, 1984. The shopping center had been constructed prior to 1972.

CJV does not have any direct employees. On April 27, 1984, CJV entered into a management agreement with MSM, an Indiana corporation, pursuant to which MSM assumed the responsibility for the management, control, and maintenance of the shopping center. CJV and MSM are interlocked to the extent that they are part of a real estate investment trust scheme and are owned directly or indirectly by the Simon family. However, this appears to be of no consequence in the resolution of this case.

MSM manages approximately 200 properties located throughout the United States and has in excess of 2,000 employees, including the employees working at the Crossroads, one of whom was Plock.

CJV does not handle the day-to-day operations of the Crossroads; rather, these functions are carried out by MSM. Information is reported by MSM from a financial standpoint rather than an operational standpoint. CJV has no procedure for onsite inspections, identifying safety problems, or supervising MSM's work at the Crossroads.

Under the terms of the management agreement, exhibit 71, MSM was responsible for leasing the space; paying taxes, interest, and water and sewer rents; complying with building and licensing requirements; defending as to eminent domain proceedings; paying for gas, electricity, steam, telephones, elevators, and window cleaning; and maintaining and repairing the premises through independent contractors or its own employees and was to, "at Owner's [CJV's] expense, hire, discharge and supervise all labor and employees required for the on-site management, operation, maintenance and repair of the Shopping Center." Although the management agreement specified that MSM was to be an independent contractor, the

owner, CJV, retained the right to make certain decisions regarding rental terms, selecting of tenants, dealing with taxes and insurance, and similar actions that would not have an adverse effect upon MSA Realty Corporation's (one of the copartners of CJV) qualifications as a real estate investment trust, and CJV also had the right to approve the property budget under which MSM was to operate.

Plock was 30 years old at the time of the trial. He began work with MSM at the Crossroads as a custodian and later joined the maintenance crew.

According to Plock's testimony, on the day of his accident and injury, June 2, 1985, he arrived at work at 4 a.m. He had been using a sweeper truck to sweep out the parking lot and the tunnel. When he had completed sweeping the tunnel, one of his fellow employees asked him for assistance in moving some stages. Plock parked his truck near one of several drain holes located in the tunnel. He stepped out of the truck with his left foot first, and his right foot went into a drain hole. Plock fell to the ground, breaking his fall with his hands. He felt instant discomfort and a burning sensation in his lower leg.

Plock further testified that there was water around the drain hole into which he stepped, that he saw no drain cover, and that he did not look for a drain because "I got out of my truck like I did a thousand times before." When asked on cross-examination why he never looked down when he stepped out of the truck, he answered, "I assumed the ground was there and I did not look down."

Plock helped with the loading of the stages onto a truck and then went on a 45-minute break. Following his break, he loaded a rototiller with the help of a fellow employee and took it to a planter area and began tilling. However, he had to stop because of the problem with his leg. He was taken to Methodist Hospital, where he was examined and later released.

Plock later visited Dr. Morrison, who was an orthopedic surgeon. He diagnosed the injury as a fracture of the lower leg. Numerous surgical procedures were performed to repair the injury to the ankle. Plock developed infection and other complications in his leg, and on November 1, 1986, his leg was amputated 6 inches below the knee.

Plock currently is employed as a welder, the occupation for which he was originally trained, and earns $6.90 per hour, which is $1.89 more than he was earning at the time of his accident.

The Crossroads has experienced problems with the drains since at least 1972. Water would often collect around the drain holes. The water was usually dirty, which made the drains very difficult to see. Plock testified that on the morning of the accident there was muddy water around the drain hole into which he stepped.

In addition to the drainage problem, the drain holes were covered by lids that would "pop out," and some lids were missing. Testimony indicated that the cover was missing from the drain into which Plock stepped.

There was testimony by Plock that he knew that when vehicular traffic went through the tunnel, sometimes the drain hole covers would pop out; that he knew where all of the drain holes were located; and that when the covers would pop out from time to time, he would replace them if he saw that they were off because that was part of his job.

Although Plock admitted that it was part of his job to replace the cover lids upon the drain holes when they popped off, the actual purchasing and repair of the covers was the responsibility of Pietro Petrini. Petrini, an employee of MSM, testified that the drain cover lids were not replaced because in the 14 years that the drains had been in place at the Crossroads, no one had ever been hurt or injured as a result of the drain covers' not being in place.

CJV's 19 assignments of error may be summarized as follows:

1. The court erred in failing to find that CJV had contracted management and maintenance of the Crossroads to the plaintiff's employer, MSM, and thus owed no duty concerning the condition of the premises.

2. The court erred in holding that the negligence of the possessor of the premises can be imputed to the owner of the premises under a principal/agent theory.

3. The court erred in failing to hold that if an agent is immune from suit for its negligence, then the principal is likewise

immune.

4. The court erred in failing to hold that an employer of an independent contractor or agent can only be vicariously liable to the employees of an independent contractor or agent for their injuries as a statutory employer under the workers' compensation laws.

5. The court erred in failing to hold that if an invitee has knowledge of the condition on the premises comparable to or greater than the alleged invitor on the premises, then the invitor cannot be negligent in regard to those conditions.

6. The court erred in not holding that the plaintiff Plock was contributorily negligent as a matter of law because the alleged defect in the premises was open, obvious, and one the plaintiff was employed to correct.

7. The court erred in the instructions given to the jury.

8. The court erred in not granting a new trial because the damages were excessive.

Plaintiffs have cross-appealed, claiming the trial court erred by failing to submit the issue of CJV's own negligence and nondelegable duty to the jury.

It is alleged, in substance, by plaintiffs in their amended petition that MSM was the employer of Plock; that Plock was injured during the course of his employment for MSM; that Aetna, as the workers' compensation insurance carrier for MSM, provided workers' compensation benefits to Plock for that injury; that Rob Morse was the agent of CJV; and that the acts and omissions of Morse and the employees of MSM, which were negligent and the proximate cause of Plock's injuries, were imputed to CJV. In actuality, the evidence discloses without contradiction that Morse was an employee of MSM.

In its answer, CJV admitted all allegations relating to the employment of Plock by MSM and receipt by Plock of workers' compensation benefits. The answer alleged as affirmative defenses that CJV had delegated all responsibility for the management of the Crossroads to MSM, i.e., that MSM was an independent contractor, and that Plock was contributorily negligent, and, among other allegations, claimed that "Plaintiffs' Amended Petition fails to state facts sufficient to constitute a cause of action against this Defendant."

In its pretrial motion for summary judgment, CJV alleged the delegation of control to an independent contractor, MSM. This reason was repeated in CJV's motion for a directed verdict. In its motion for judgment notwithstanding the verdict, it alleged that the verdict was not supported by the evidence and was contrary to law and that no evidence was presented to show that CJV should have foreseen that Plock would fail to protect himself from an open and obvious condition or to show that CJV was in possession and control of the premises. All of those motions were overruled.

CJV raises on appeal for the first time that CJV is immune from suit at common law on the basis that its agent, MSM, is liable to Plock only for workers' compensation benefits; that any liability on the part of CJV is only as imputed to it by the liability of such agent; and that as the agent is immune, the principal is immune. Because we decide the case on that basis, it will not be necessary to exhaustively treat all of the claimed errors assigned by CJV.

CJV and plaintiffs each spent a great deal of time arguing the issue of independent contractor and whether CJV was a possessor or in control of the premises, and whether the fact that the dangerous condition was known to Plock relieved CJV of any liability. See, *Carnes v. Weesner*, 229 Neb. 641, 428 N.W.2d 493 (1988); *Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972).

However, the fact remains that the issue as to whether MSM was an independent contractor or an agent was submitted to the jury by instruction No. 16, which reads in part as follows:

> If you find that MS Management, Inc. was an independent contractor with respect to the maintenance of the Crossroads Shopping Center, then the Defendant Crossroads Joint Venture had no duty whatsoever with respect to the Plaintiff.
>
> On the other hand, if you find that MS Management, Inc. was an agent of the Defendant Crossroads Joint Venture with respect to the maintenance of the Crossroads Shopping Center and was acting within the scope of its authority, then the duty of Defendant Crossroads Joint Venture is set forth in these instructions.

The determination of whether one is an independent contractor or an agent is properly one of fact to be determined after applying the appropriate standards. See *Maricle v. Spiegel*, 213 Neb. 223, 329 N.W.2d 80 (1983). By finding in favor of the plaintiffs, the jury must have found that MSM was acting as the agent of CJV. In an appeal of an action at law, the Supreme Court does not reweigh the evidence; rather, the court considers the evidence in the light most favorable to the successful party, with conflicts resolved in favor of the successful party, who is entitled to the benefit of every inference which can reasonably be deduced from the evidence. *Brown v. Farmers Mut. Ins. Co.*, 237 Neb. 855, 468 N.W.2d 105 (1991); *Laird v. Scribner Coop*, 237 Neb. 532, 466 N.W.2d 798 (1991). The conclusion of the trial court will not be set aside unless clearly wrong. *Laird, supra.*

The law imputes to the principal or master responsibility for the negligent acts of his or her agent or servant done in obedience to the express orders or directions of the master, or within the scope of the employee's authority or employment in the master's business, and if those acts cause injury to third persons, the law holds the principal or master liable therefor. *Pullen v. Novak*, 169 Neb. 211, 99 N.W.2d 16 (1959). For injuries caused by the negligent act of an employee not directed or ratified by the employer, the employee is liable because he or she committed the act which caused the injury, while the employer is liable, not as if the act had been done by the employer, but because of the doctrine of respondeat superior, the rule of law which holds the master responsible for the negligent act of his or her servant committed while the servant was acting within the master's business. *Pullen, supra.* Unless the servant is liable, there can be no liability on the part of the master. *Pullen, supra.* The principal's liability, if any, is not that of a joint tort-feasor, but is derived solely from the liability of its agent, if any. *Wicker v. City of Ord*, 233 Neb. 705, 447 N.W.2d 628 (1989); *Pullen, supra.* Thus, the liability of the principal, CJV, is derived from the liability of its agent.

MSM acquired workers' compensation insurance, as required by Neb. Rev. Stat. § 48-145 (Reissue 1984). Plock's injury was incurred during the course and scope of his

employment. As a result of that injury, Aetna provided workers' compensation benefits to Plock. This effectuated a release of MSM from further liability for the injury. See Neb. Rev. Stat. § 48-111 (Reissue 1988). The Nebraska Workers' Compensation Act is the employee's exclusive remedy against an employer for an injury arising out of and in the course of employment. *Millard v. Hyplains Dressed Beef*, 237 Neb. 907, 468 N.W.2d 124 (1991).

In *Ericksen v. Pearson*, 211 Neb. 466, 319 N.W.2d 76 (1982), this court determined that the release of an agent releases the principal. The court stated:

> The general rule is stated in 76 C.J.S. *Release* § 50 at 689 (1952) as follows: "In a situation where several persons are not actively joint tort-feasors, but one person commits the tort and is primarily liable while the liability of the other person is derivative or secondary, as where it arises under the doctrine of respondeat superior, the releasor's acceptance of satisfaction from one, discharges the other as well, as in the case of master and servant or principal and agent; and it has been held that this is true despite an attempted reservation of rights against the person secondarily liable, since if the rule were otherwise, such person would be liable without having recourse against the person primarily liable, the latter having been released . . . ."

211 Neb. at 475, 319 N.W.2d at 81. See, also, *Wicker, supra*.

Where the master is to respond to damages solely on account of his or her servant's negligence, a judgment dismissing the servant but holding the master liable is inconsistent. *Sears v. Mid-City Motors, Inc.*, 179 Neb. 100, 136 N.W.2d 428 (1965). This inconsistency would be even more prevalent where the material evidence against both defendants is the same. See *Sears, supra*. This is the situation here. The evidence was that Petrini, the employee of MSM, was directly responsible for maintenance of the drains, and he failed to replace the drain cover, and MSM, and through it, CJV, failed to supervise in such a manner as to correct the situation. Any evidence of negligence on the part of CJV would be the same as that of its agent, MSM.

It is stated in 3 Am. Jur. 2d *Agency* § 348 at 857 (1986) that "a statute that bars a claim against an agent equally protects those in whose behalf he acted as agent . . . ." This court agrees with this proposition.

In *Wicker, supra*, this court held that the immunity granted to certified ambulance attendants by Neb. Rev. Stat. § 71-5111 (Reissue 1986) shielded their principal from liability to the same extent as it shielded the agent attendants. The court found that the liability was derived solely from the actions of the agents; therefore, any release of the agents by the statute also released the principal.

In the present case, CJV's liability is derived solely from the actions of its agent, MSM, which is liable for the actions of its employee, Petrini, in not replacing the drain covers. To release MSM but not release CJV would be inconsistent. CJV would be unable to recover from MSM, the party primarily liable for the damages paid to Plock, because MSM is immune from suit. The immunity of MSM because of the release effectuated by the workers' compensation statute releases CJV, the principal. See *Rowley v. City of Baltimore*, 305 Md. 456, 505 A.2d 494 (1986) (city of Baltimore owned convention center and contracted with a management company to manage center; plaintiff was employed by management company and was assaulted while at work by person who came through door with defective lock; city of Baltimore held not liable to employee of independent contractor because of workers' compensation benefits paid by management company).

> The employer's liability for damage resulting from the negligence of the independent contractor is limited to third parties largely because the employer has in a sense already assumed financial responsibility for the injuries to the employees in that the contract he or she pays to the independent contractor necessarily includes the cost of the insurance premiums that the independent contractor must pay for workers' compensation coverage.

Id. at 470, 505 A.2d at 501. The same rationale would apply to a principal and agent situation.

See, also, *King v. Shelby Rural Electric Cooperative Corp.*, 502 S.W.2d 659 (Ky. 1973), *cert. denied* 417 U.S. 932, 94 S. Ct.

2644, 41 L. Ed. 2d 235 (1974). (Shelby operated electric transmission line and hired Electricom to convert single-phase transmission line to a three-phase line, and plaintiff, employee of Electricom, was injured because of admitted negligence of Electricom.)

> Industrial workers are usually protected by Workmen's Compensation laws under which they may recover of their employer for injuries arising out of their work. This recovery may be had although the injury was brought about by the employee's carelessness and absent any negligence on the part of the employer. The price of this social legislation is that when the employee accepts the benefits he releases the employer from tort liability for negligence.
>
> In the case at bar the appellant was protected by and collected Workmen's Compensation from his employer, Electricom. The premiums for the Workmen's Compensation insurance carried by Electricom were undoubtedly a factor in the determination of the contract price between Electricom and Shelby, so that ultimately Shelby paid the premiums.
>
> We can see no reason why appellant, simply because he was an employee of an independent contractor, should be placed in a better position than if he had been an employee of Shelby, in which case his recovery would be limited without question to the benefits provided by the Workmen's Compensation Act. Conversely, we see no valid reason why Shelby should be subjected to more liability simply because it engaged the services of a qualified independent contractor. Employers frequently farm out work which requires some special skill to an independent contractor skilled in that particular work. The imposition of additional tort liability upon the employer because of the selection of an independent contractor would have a tendency to discourage the practice of selecting skilled independent contractors and cause employers to do the work with their own, sometimes less skilled, work force.

502 S.W.2d at 663.

In this circumstance we perceive no distinction between employment of an independent contractor or of an agent. In this case, according to the management agreement, it was stated that "the Manager [MSM] has the experience and skill necessary and suitable for the management and operations of a shopping center . . . ."

The management agreement also provided that CJV would pay the expenses incurred by MSM, which quite apparently would include workers' compensation insurance premiums.

However, plaintiffs insist that the exclusivity of the Workers' Compensation Act is an affirmative defense which CJV did not plead.

As a general rule, in a common-law tort action to recover damages for a work-related injury, the burden of proving the affirmative defense of the exclusivity of the Workers' Compensation Act is on the employer. The failure to plead the defense *may* result in the defense's being waived if not raised in time. 2A A. Larson, *The Law of Workmen's Compensation* § 65.12 (1990). See, *Doney v. Tambouratgis*, 23 Cal. 3d 91, 587 P.2d 1160, 151 Cal. Rptr. 347 (1979) (stating that the person requesting to be one of the persons protected from an action at law by the provisions of the workers' compensation act bears the burden of pleading and proving, as an affirmative defense, that he or she is in the class protected by the act); *Ammons v. Hood*, 288 S.C. 278, 341 S.E.2d 816 (1986) (finding that a defendant who wishes to raise the exclusivity of workers' compensation as a defense must do so affirmatively). However, the New York Court of Appeals has held that the defense is waived only when ignored to the point of final disposition. See *Murray v. City of New York*, 43 N.Y.2d 400, 372 N.E.2d 560, 401 N.Y.S.2d 773 (1977) (holding that workers' compensation is the exclusive remedy as a matter of substantive law, and hence, whenever it appears from the plaintiff's pleadings, bill of particulars, or the facts that the plaintiff was an employee of the defendant, the obligation of alleging and proving noncoverage or applicability of workers' compensation benefits falls on the plaintiff; the court continued, stating that waiver may be accomplished by ignoring the issue to the point of final disposition).

There are several exceptions to the general rule that necessitates affirmative proof of the defense. See 2A A. Larson, *supra*. The first exception is when the employer-employee relationship is shown in the plaintiff's complaint. *Id.*; *Doney v. Tambouratgis*, *supra*. Another occurs when the plaintiff admits that the injuries arose in the course of employment by the defendant. 2A A. Larson, *supra*. The final exception is the actual acceptance of compensation benefits. *Id.*

In *Doney v. Tambouratgis, supra*, the court held that the defendant failed to affirmatively plead and prove the jurisdiction of the workers' compensation act and therefore waived the defense of the exclusivity of the act and could not raise it later on a motion for nonsuit or by posttrial motions for new trial or judgment notwithstanding the verdict. The court noted that if the complaint affirmatively alleges facts which indicate coverage by the act and there are no additional facts which negate the application of the exclusivity of the act, then "no action will lie and the complaint is subject to a general demurrer." *Doney, supra* at 97, 587 P.2d at 1164, 151 Cal. Rptr. at 350.

In *Clements v. Ga. Power Co.*, 148 Ga. App. 745, 252 S.E.2d 635 (1979), the court stated that an employee who receives workers' compensation is not barred from suit against a third party, such as the wrongdoer causing the injury. The court noted that there were two exceptions to this rule: the employee cannot sue a fellow employee of the employer, and the employee cannot sue a third party who is the alter ego of the employer corporation. See, *Vaughn v. Jernigan*, 144 Ga. App. 745, 242 S.E.2d 482 (1978); *Chambers v. Gibson*, 145 Ga. App. 27, 243 S.E.2d 309 (1978). In *Clements*, the issue of the exclusivity of the workers' compensation act was raised by summary judgment. The court found that the amended petitions alleged that the defendant " 'had the right of control over the work' " of the decedent's employer from which workers' compensation had already been received, as evidenced by an affidavit. *Clements, supra* at 749, 252 S.E.2d at 638. The court stated that the decedent's employer was clearly the servant of the defendant. See *Savannah Electric &c. Co. v. Edenfield*, 118 Ga. App. 531, 164 S.E.2d 366 (1968).

In *Doubleday v. Boyd Const. Co.*, 418 So. 2d 823 (Miss. 1982), the court found that where the contractor required the subcontractor to provide workers' compensation insurance to its employees, the contractor was not a third party which could be sued and was thus immune from the employee's common-law negligence action. The court dismissed the general contractor under the exclusive remedy provision. The court in *Doubleday* also noted its previous holding in *Robertson v. Stroup*, 254 Miss. 118, 180 So. 2d 617 (1965), that workers' compensation was the exclusive remedy of an injured employee in agency cases.

The court in *Doubleday* also discussed the logic in granting the general contractor immunity. The court stated:

> As stated, the obvious purpose of the statute [providing for workers' compensation as an employee's exclusive remedy against the employer] is for the protection of employees of subcontractors who do not carry workmen's compensation insurance. It would be paradoxical however, in our opinion, to hold as the appellant entreats that a general contractor risk personal injury judgments in common law suits if he complies with the statute by contractually securing compensation insurance by his subcontractor, but if he lets work to subcontractors who do not comply with the act, then his liability is limited to the sums provided by the act. We do not think the legislature intended such an improbable result.

418 So. 2d at 826.

The court, in quoting from 2A A. Larson, *The Law of Workmen's Compensation* § 72.31b (1982), further stated that " '[a] sounder result would seem to be the holding that the overall responsibility of the general contractor for getting subcontractors insured, and his latent liability for compensation if he does not, should be sufficient to remove him from the category of "third party." ' " 418 So. 2d at 826.

In the case *Rowland v. County of Sonoma*, 220 Cal. App. 3d 331, 269 Cal. Rptr. 426 (1990), the subject of the exclusivity of the workers' compensation act was again addressed. The court stated that the defendant attempted to avoid the jurisdiction of the workers' compensation court and to instead confer civil

jurisdiction. The court noted the decision in *Doney v. Tambouratgis*, 23 Cal. 3d 91, 587 P.2d 1160, 151 Cal. Rptr. 347 (1979), and drew attention to the exception to the duty to affirmatively plead the exclusivity of the workers' compensation act if the complaint directly or indirectly alleges facts which indicate an employment relationship exists. The court continued, stating that where the record indicates an employment relationship and if the Workers' Compensation Appeals Board truly has exclusive jurisdiction of cases involving injuries in the course of employment, then the trial court should be limited to considering the jurisdiction question. The court also stated that the exception should apply where postpleading motions show that the condition leading to compensation might exist. The court concluded that the issue of subject matter jurisdiction could be raised at any time.

In *Parmer v. Bean*, 636 S.W.2d 691 (Mo. App. 1982), the court found that regardless of the manner in which the application of the workers' compensation law is raised in defense to a common-law tort action, the court should consider it as a motion to dismiss for lack of subject matter jurisdiction. The court granted the motion for summary judgment, treating it as if it were a motion to dismiss for lack of subject matter jurisdiction. In *LeFlar v. Gulf Creek Indus. Park No. 2*, 511 Pa. 590, 515 A.2d 875, 879 (1986), the court held that

> the Workmen's Compensation Act deprives the common pleas courts of jurisdiction of common law actions in tort for negligence against employers and is not an affirmative defense which may be waived if not timely plead [sic]. The lack of jurisdiction of the subject matter may be raised at any time and may be raised by the court sua sponte if necessary.

The cause was remanded for a determination of whether the decedent was an employee or an independent contractor.

Plaintiffs insist that CJV has waived the defense of the exclusivity of the Workers' Compensation Act by failing to plead the defense affirmatively in CJV's answer. They cite to Neb. Rev. Stat. § 25-811 (Reissue 1989), which states, "The answer shall contain . . . a statement of any new matter constituting a defense . . . ." The rationale for requiring the

defendant to plead a specific defense is to set forth the defense so that the plaintiff may be advised of the exact defense he or she will be required to meet and the trial court may be informed as to the exact issues to be determined. See, *Timmerman v. Hertz*, 195 Neb. 237, 238 N.W.2d 220 (1976); *Lehnherr v. National Accident Ins. Co.*, 126 Neb. 199, 252 N.W. 823 (1934).

Plaintiffs analogize the statute of limitations with the exclusivity of the Workers' Compensation Act. The general rule in Nebraska is that when *it is not apparent from the face of the petition* that the action is barred by the statute of limitations, the affirmative defense of the statute of limitations must be raised in the answer. *L.J. Vontz Constr. Co. v. Department of Roads*, 232 Neb. 241, 440 N.W.2d 664 (1989). See, also, *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984). When it is apparent from its face that an action is barred by the statute of limitations, the petition fails to state a cause of action and is subject to demurrer. *L.J. Vontz Constr. Co., supra.* "Since a defendant cannot raise the statute of limitations for the first time on appeal, a defendant waives the statute of limitations by failure to raise the issue in a demurrer *or the defendant's answer.*" (Emphasis supplied.) *L.J. Vontz Constr. Co., supra* at 244, 440 N.W.2d at 665-66.

However, in the case of *Johnson v. Hays*, 193 Neb. 54, 225 N.W.2d 397 (1975), this court held that a petition may be attacked at any stage of the proceedings on grounds that it fails to state a cause of action, although when the attack is delayed until appeal, the pleadings will be liberally construed. Thus, based on *Johnson*, it would appear that a petition which on its face shows that the action is barred by the statute of limitations may be attacked even at the appeal stage.

In any event, the defendant, by pleading in its answer that the petition failed to state a cause of action against defendant, had effectively demurred to plaintiffs' petition, and the trial court should have dismissed the action.

Unless the assignment of error regarding the nondelegability of CJV's duty to keep the premises safe for invitees, as alleged by plaintiffs, is valid, the judgment must be reversed and the cause dismissed. We now consider that assignment together with CJV's assignment relating to Plock's contributory

negligence because they are necessarily intertwined.

Plaintiffs cite us to *Simon v. Omaha P. P. Dist.*, 189 Neb. 183, 202 N.W.2d 157 (1972), as standing for the principle that an owner (in possession or control) may not avoid its duty to maintain the premises and to provide a safe place to work by contracting with another. However, in that case the defendant retained actual control of the premises at all times. CJV, on the other hand, relinquished control over the day-to-day operations of the shopping center. In addition, any immunity because of workers' compensation benefits was not an issue raised in that case; there was evidence of the continuing and active negligence of Omaha Public Power District; and there was evidence that on the day of plaintiff's fall, he had attended his first safety meeting and the particular hazard was not mentioned.

CJV argues that the rule regarding premises liability applies only to a *possessor* of land, as opposed to an *owner in control* of the premises as instructed by the trial court. The term "possessor" is used in Restatement (Second) of Torts § 343 (1965), upon which *Tichenor v. Lohaus*, 212 Neb. 218, 322 N.W.2d 629 (1982), and other similar cases are based. However, although MSM had a physical presence on the premises and was directed to manage the Crossroads operations, we do not believe that an owner under these circumstances maintaining certain reserved rights can be said to have given up the right of possession. Therefore, we will treat CJV as a possessor of land.

In *Tichenor*, as previously suggested, we cited to the Restatement, *supra*, for the proposition that a possessor of land is subject to liability for physical harm caused to invitees on its land if the possessor knows that a condition involves an unreasonable risk of harm, the possessor should expect that the invitees will not discover the danger or protect themselves against it, and the possessor fails to exercise reasonable care to protect against such dangers. In that case the plaintiff, although having earlier known of the icy condition of a sloped driveway to a parking lot, nevertheless in avoiding an oncoming automobile stepped to the side and onto a patch of ice and slipped and fell, injuring himself.

This court adopted Restatement (Second) of Torts § 343 A

(1965), which provides in substance that the possessor of land may be liable to an invitee having knowledge of the condition if the possessor should anticipate harm despite such knowledge on the part of the invitee. See *Tichenor, supra*.

This court, in *Tichenor*, further referred to the Restatement, *supra*, § 473, for the proposition that if the defendant's negligence has made the plaintiff's exercise of a right or privilege impossible unless he or she exposes himself or herself to a risk of bodily harm, the plaintiff is not guilty of contributory negligence. Such was the case in *Sullivan v. Geo. A. Hormel and Co.*, 208 Neb. 262, 303 N.W.2d 476 (1981), cited in *Tichenor*, when the plaintiff, employee of the subcontractor, was required to use the particular icy steps in leaving the premises on which he worked. Such is not the case here.

Later, in *Carnes v. Weesner*, 229 Neb. 641, 428 N.W.2d 493 (1988), we applied the rationale of *Tichenor* and, without citation, that of *Sullivan* to uphold liability against a possessor of land in favor of a business invitee who slipped and fell on an icy parking lot over which the plaintiff was required to travel.

These cases are based on the theory that where a plaintiff has no alternative route to that which he or she chooses, despite the apparent defect, it cannot be said that he or she is guilty of contributory negligence as a matter of law.

However, in *Bruyninga v. Nuss*, 216 Neb. 801, 346 N.W.2d 245 (1984), again citing *Tichenor* and the Restatement, *supra*, § 343 A, we denied recovery to a patron who had entered a service station office through a doorway in which the glass door had been propped open. The front of the service station consisted of the door and surrounding glass panels. Upon exiting, plaintiff apparently failed to look and walked into one of the glass panels. The panel shattered, and plaintiff injured his leg. We said:

> Had the plaintiff exercised reasonable care and watched where he was walking, the accident would not have occurred. Many jurisdictions deny recovery in cases such as this on the basis that any danger in a glass door arrangement consisting of a glass door and glass panel side-by-side is open and obvious and that the plaintiff is contributorily negligent as a matter of law. [Citations

> omitted.]
>
> While there are jurisdictions which allow recovery in this type of case, we are persuaded that in this instance plaintiff's failure to see what was there to be seen constitutes contributory negligence sufficient to bar recovery as a matter of law.

Nuss, supra at 804, 346 N.W.2d at 248.

Digressing briefly and returning to *Rowley v. City of Baltimore*, 305 Md. 456, 474, 505 A.2d 494, 503 (1986), the following language is instructive:

> We hold that where, as here, the independent contractor has assumed responsibility for maintenance and repairs, and the harm has occurred to the contractor or his employee as a result of a defect arising from the failure of the contractor to make those repairs, nothing in §§ 416-429 operates to impose liability upon the person who hired the contractor. Moreover, comparing the duties contemplated by §§ 416-429 with those of a landowner (§ 343) or the closely related duty of an employer to furnish a safe workplace, we find no policy or other distinction that would justify a different result where the latter duties are involved.

See, also, *Hines v. Martel Telephone Co.*, 127 Neb. 398, 402, 255 N.W. 233, 235 (1934), where this court held that an independent contractor did not have a cause of action against his employer because "[i]t seems a well-established principle that one cannot recover damages for an injury caused by defects which he himself had contracted to repair." In the instant case, the landowner employer, CJV, hired MSM to perform all maintenance and repairs. If MSM failed in that duty, it was negligent. However, as we have previously discussed, in that event MSM is immune from common-law liability because of the Workers' Compensation Act, which, under the doctrine of vicarious liability, exempts CJV. In other words, the landowner employer's nondelegable duty to maintain the premises in a safe condition does not extend to employees of an independent contractor or agent who are injured due to the failure of the independent contractor or agent to make those repairs and who, as a result, receive workers'

compensation benefits.

However, this court holds that the duty owed by the landowner employer to an independent contractor-agent and his employees to maintain in a reasonably safe condition the land upon which they work remains intact with respect to latent defects that the independent contractor-agent or his employees do not have knowledge of.

We quote further from *Rowley, supra* at 475, 505 A.2d at 503: "An employee of an independent contractor injured on the employer's premises by reason of a latent defect (known to the employer but not to the contractor *or his employee*) which existed when the work began has recourse against the employer." The corollary of the rule expressed in that citation would be that an employee of an independent contractor or agent who had knowledge of the defect in the premises would have no recourse against the owner-principal in possession of the premises.

"Where the facts presented to sustain an issue are such that but one conclusion can be drawn when related to the applicable law, it is the duty of the court to decide the question as a matter of law and not submit it to a jury." *Syas v. Nebraska Methodist Hospital Foundation*, 209 Neb. 201, 204, 307 N.W.2d 112, 114 (1981). "This court has stated that in order to sustain a motion for directed verdict, the court resolves the controversy as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion." *Bray v. Kate, Inc.*, 235 Neb. 315, 317, 454 N.W.2d 698, 701 (1990).

In *Gardner v. Metropolitan Utilities District*, 134 Neb. 163, 278 N.W. 137 (1938), this court held that one entering a darkened room on her own premises where a trapdoor to the cellar steps was liable to be open without ascertaining whether the door was open or shut, and where the meter reader had left the door open, was guilty of negligence sufficient to bar recovery as a matter of law. See, also, *Bruyninga v. Nuss*, 216 Neb. 801, 346 N.W.2d 245 (1984); *Whitcomb v. State Fed. Sav. & Loan Assn.*, 190 Neb. 26, 205 N.W.2d 652 (1973); *Weiss v. Autumn Hills Inv. Co.*, 223 Neb. 885, 395 N.W.2d 481 (1986) (Caporale, J., dissenting).

It is undisputed that Plock knew exactly where the drain

holes were at all times in the tunnel, that he knew water tended to pond over the drain holes, that he worked on the premises every workday and knew the covers would pop out from time to time, and that it was his duty to and he did replace them when he saw them missing. He also admitted that he did not look down when he stepped into what turned out to be a puddle of water over a drain hole.

Even though it may be human nature sometimes to ignore the obvious and disregard the familiar, and a person may be so distracted by his or her work that at the time the accident occurred the injured party was unaware of the specific dangerous condition existing at that moment which caused the injury, the rule in this jurisdiction remains that one must exercise ordinary care for his or her own safety, and this duty is commensurate with the danger to which he or she is exposed. *Rodgers v. Chimney Rock P.P. Dist.*, 216 Neb. 666, 345 N.W.2d 12 (1984).

Plock's knowing that the drain holes existed and where they were located and failing to look before stepping into one of them amounts to contributory negligence as a matter of law. One who is capable of understanding and discretion, such as the plaintiff in this case, and who fails to exercise ordinary care and prudence to avoid defects and dangers which are either open and obvious or are known to him is negligent or contributorily negligent. See *Rodgers, supra*.

Whether we conclude that CJV had no duty to Plock because there was no reason for it to expect that he would not know of the danger or we conclude that Plock was guilty of sufficient contributory negligence as a matter of law to bar his recovery, the outcome must be the same.

The judgment of the district court is reversed and the cause is remanded with directions to enter judgment for the defendant.

REVERSED AND REMANDED WITH DIRECTIONS.

WHITE, J., concurs in the result.

STATE OF NEBRASKA, APPELLEE, V. JOHN SPIEGEL, APPELLANT.

474 N.W.2d 873

Filed October 4, 1991. No. 90-382.

1. **Appeal and Error.** This court will not consider assignments of error which are not discussed in the brief.
2. **Pleas: Waiver: Indictments and Informations.** A plea of no contest is equivalent to a plea of guilty. Such a plea waives every defense to the charge, whether the defense is procedural, statutory, or constitutional, except the defense that the information is insufficient to charge a crime.
3. **Indictments and Informations.** Where an information alleges commission of a crime using the language of the statute defining that crime or terms equivalent to such statutory definition, a formal charge against an accused is sufficient.
4. _____. The function of an information is twofold. With reasonable certainty, an information must inform an accused concerning the crime charged so that the accused may prepare a defense to the prosecution and, if convicted, be able to plead the judgment of conviction on such charge as a bar to a later prosecution for the same offense.
5. **Pleas: Sentences: Probation and Parole.** There is no requirement in this state that the sentencing court must inform a defendant contemplating a guilty plea or a plea of no contest of the possibility of probation, as long as the court advises him of the existence, if any, of a mandatory minimum sentence as well as the full range of possible penalties.
6. _____: _____: _____. No case in Nebraska has required a sentencing court to inform a defendant contemplating a guilty plea of the possible restrictions of freedom of movement in an order of probation. For that matter, no authority exists in this state that requires the defendant to be informed of the possibility of probation at all.
7. **Sentences: Appeal and Error.** The Supreme Court may reduce a sentence rendered by a district court against an accused when, in the opinion of this court, the sentence is excessive.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Affirmed as modified.

John S. Mingus, of Mingus & Mingus, for appellant.

Robert M. Spire, Attorney General, and Barry Waid for appellee.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

John Spiegel appeals his conviction and sentence for obtaining, in 1988, a controlled substance by misrepresen-

tation, fraud, forgery, deception, or subterfuge.

We affirm Spiegel's conviction, but reduce the amount of time that Spiegel may be required to spend in jail as a term of probation imposed upon him by the district court for Hall County.

In this appeal, Spiegel mainly argues that (1) the information alleging that he obtained a controlled substance in violation of Neb. Rev. Stat. § 28-418(1)(c) (Reissue 1985) was insufficient to charge he committed a crime and (2) that his sentence of probation is beyond statutory limits.

Spiegel became addicted to Vicodin, a painkiller which had been legally prescribed for him following a series of surgeries. Spiegel admitted that on at least seven occasions in 1988, he presented photocopies of a prescription for Vicodin and obtained the drug from two different Hall County pharmacies. The photocopies themselves were not made by persons authorized to issue prescriptions. Spiegel was charged with two counts of obtaining a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge.

Spiegel filed a demurrer to the State's information, a plea in abatement, and a motion to quash the information, all of which were overruled. Spiegel then entered a plea of no contest to the second count of the two-count information. In exchange, the State dismissed the first count of the information. He was sentenced to 2 years' probation, with a requirement that he spend 180 days in jail, of which 90 days were to be spent in jail on weekends at the beginning of the probation term and the remaining 90 days at the end of the term. The court reserved the right to waive Spiegel's second 90-day confinement to jail.

Spiegel argues that the trial court erred in (1) overruling his demurrer, plea in abatement, and motion to quash (none of which are particularly distinguishable from each other); (2) failing to specifically inform Spiegel that he could be confined to jail as a term of probation; and (3) imposing confinement to jail as a term of probation. In all, Spiegel alleges six assignments of error, but he failed to argue the merits of three of the assigned errors. This court will not consider assignments of error which are not discussed in the brief. *State v. Bonczynski*, 227 Neb. 203, 416 N.W.2d 508 (1987).

Spiegel's plea of no contest has narrowed the issues which can properly be presented on appeal. A plea of no contest is equivalent to a plea of guilty. *State v. Johnson*, 234 Neb. 110, 449 N.W.2d 232 (1989). Such a plea waives every defense to the charge, whether the defense is procedural, statutory, or constitutional, except the defense that the information is insufficient to charge a crime. *Id.* Therefore, the issues remaining on appeal in Spiegel's case are (1) whether the information fails to charge a crime, (2) whether the court is required to inform a defendant that confinement in a jail is a possible condition of probation, and (3) whether confinement to jail as a term of probation is proper in Spiegel's case.

The critical question in the first issue is whether the count in the information to which Spiegel pled no contest is sufficient to charge a crime. Where an information alleges commission of a crime using the language of the statute defining that crime *or terms equivalent* to such statutory definition, a formal charge against an accused is sufficient. See *State v. Wehrle*, 223 Neb. 928, 395 N.W.2d 142 (1986). The function of an information is twofold. With reasonable certainty, an information must inform an accused concerning the crime charged so that the accused may prepare a defense to the prosecution and, if convicted, be able to plead the judgment of conviction on such charge as a bar to a later prosecution for the same offense. *Id.*

Spiegel was charged with violation of § 28-418(1)(c), which reads: "It shall be unlawful for any person knowingly or intentionally . . . (c) To acquire or obtain or to attempt to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge . . . ." The controlled substance that Spiegel was charged with illegally obtaining is found in Neb. Rev. Stat. § 28-405 [Schedule III] (Cum. Supp. 1988):

> (c) Any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs . . . (4) Not more than three hundred milligrams of dihydrocodeinone per one hundred milliliters or not more than fifteen milligrams per dosage unit, with one or more active, nonnarcotic ingredients in recognized therapeutic amounts . . . .

The gravamen of the charged offense is the obtaining of "[n]ot more than three hundred milligrams of dihydrocodeinone per one hundred milliliters *or* not more than fifteen milligrams per dosage unit" (emphasis supplied) by misrepresentation, fraud, forgery, deception, or subterfuge.

The information charging Spiegel alleges that he,

> on or about June 23, 1988, knowingly or intentionally acquired or obtained or attempted to acquire, or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge, to-wit: Vidocin [sic] containing not more than three hundred milligrams of dihydrocodeinone per one hundred milliliters or not more than fifteen milligrams per dosage unit, with one or more nonnarcotic ingredients in recognized therapeutic amounts . . . .

In the information, Vicodin is obviously misspelled as "Vidocin," although it was correctly spelled in the complaint originally filed against Spiegel in the Hall County Court which set forth the charge to which he entered a plea of no contest in the district court. After a preliminary hearing in county court, Spiegel was bound over to the district court for Hall County for trial. The misspelling of Vicodin appears to have first occurred with the filing of the information in that court. In his plea in abatement filed in the district court, Spiegel described the charge against him in the following language: " '*Vicodin* containing not more than three hundred milligrams of dihydrocodeinone per one hundred milliliters or not more than fifteen milligrams per dosage unit, with one or more active nonnarcotic ingredients in recognized therapeutic amounts.' " (Emphasis supplied.)

By containing the descriptive language from § 28-405, "containing . . . [n]ot more than three hundred milligrams of dihydrocodeinone per one hundred milliliters or not more than fifteen milligrams per dosage unit," the information was sufficient to inform Spiegel of the controlled substance that he was charged with illegally obtaining. The specific use of the trade name "Vicodin" in the information is not only unnecessary to constitute a proper charge, but is mere surplusage. Neb. Rev. Stat. § 28-404 (Reissue 1989) provides

that "[a]ll drugs and substances . . . listed in section 28-405 are hereby declared to be controlled substances, whether listed by official name, generic, common or usual name, chemical name, brand, or trade name." The statute under which Spiegel was charged does not refer to the trade name "Vicodin."

When the totality of the circumstances as shown by the record in this case is considered, Spiegel was not only sufficiently informed with what he was being charged, but through his pleading acknowledged that he knew with what he was being charged. Anyone reviewing the information in this case can readily discern the charge for which Spiegel was convicted. That being true, there is no way in which Spiegel could be prejudiced in the future, nor has he shown that he has been prejudiced in this particular case. Spiegel's argument as to the first issue has no merit.

As to the second issue, Spiegel complains that the trial court failed to inform him at the time of his plea that one of the terms of probation could be some confinement in jail. There is no requirement in this state that the sentencing court must inform a defendant contemplating a guilty plea or a plea of no contest of the possibility of probation, as long as the court advises him of the existence, if any, of a mandatory minimum sentence as well as the full range of possible penalties. See *State v. Stastny*, 223 Neb. 903, 395 N.W.2d 492 (1986). In *State v. Stastny, supra*, the statute under which Stastny was charged mandated some jail confinement if he was given a sentence of probation. For a defendant charged as was Spiegel, the statutes do not prescribe a minimum jail confinement whether a straight sentence is imposed or whether the defendant is sentenced to probation. The record shows that at the time of the initial arraignment and again before Spiegel entered his no contest plea, the trial court explained to Spiegel that the offense with which he was charged was a Class IV felony, carrying a possible penalty of up to 5 years' imprisonment, a fine of up to $10,000, or both. There is no mandatory minimum sentence for the offense with which Spiegel was charged. The possible range of penalties was adequately explained to Spiegel before he entered his no contest plea. In *State v. Stastny, supra* at 905, 395 N.W.2d at 494, we observed that

> no case in Nebraska has required a sentencing court to inform a defendant contemplating a guilty plea of the possible restrictions of freedom of movement in an order of probation. For that matter, no authority exists in this state that requires the defendant to be informed of the possibility of probation at all.

That observation is still valid today. Spiegel's contention regarding the second issue has no merit.

As to the third issue, Spiegel argues that jail confinement as a term of probation is contrary to law. As a general statement, that is incorrect. Neb. Rev. Stat. § 29-2262(2)(b) (Cum. Supp. 1988), which was in effect when Spiegel committed the act of which he was convicted, permitted a sentencing court in its discretion to require an offender who was sentenced to probation "[t]o be confined periodically in the county jail or to return to custody after specified hours, but not to exceed ninety days . . . ."

In 1989, the Legislature amended § 29-2262 to provide that jail confinement as a term of probation in a felony case could be as long as 180 days. Obviously, the trial court confined Spiegel to jail as a term of his probation under the 1989 version of § 29-2262. This was error. The application of the 1989 amendment to § 29-2262 to crimes that occurred before the date of the amendment violated the ex post facto clause of Neb. Const. art. I, § 16. See, *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986); *State v. McCoy*, 87 Neb. 385, 127 N.W. 137 (1910).

Under Neb. Rev. Stat. § 29-2308 (Reissue 1989), the Supreme Court may reduce a sentence rendered by a district court against an accused when, in the opinion of this court, the sentence is excessive. Under the terms of § 29-2308, we amend the term of Spiegel's probation relating to jail confinement to provide that he shall be confined in the Hall County jail for 90 days starting when the mandate from this court is received by the clerk of the trial court. Said confinement is to be served on weekends, from Friday at 6 p.m. to Sunday at 6 p.m. The term of probation providing that Spiegel should be confined in the Hall County jail for 90 days at the end of his probation unless waived by the trial court upon recommendation of the

probation officer is vacated. There was no abuse of discretion by the trial court in fixing the other terms of Spiegel's probation, and those terms are affirmed. Any lesser terms of probation would depreciate the seriousness of the offense Spiegel committed and would promote disrespect for the law.

AFFIRMED AS MODIFIED.

WHITE, J., participating on briefs.

TANYA C. MADDUX, APPELLEE AND CROSS-APPELLANT, V. THOMAS C. MADDUX, APPELLANT AND CROSS-APPELLEE.

475 N.W.2d 524

Filed October 11, 1991. No. 89-403.

1. **Appeal and Error.** The Supreme Court always reserves the right to correct error unassigned or uncomplained of but which is plainly evident from the record and prejudicially affects a litigant's substantial right, and which if left uncorrected would result in a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process, regardless of whether the error was raised at trial or on appeal.
2. **Contempt.** This court has made a distinction between civil, or coercive, and punitive contempt sanctions. When a coercive sanction is imposed, the contemner holds the keys to his jail cell, in that the sentence is conditioned upon his continued noncompliance. A punitive sanction is akin to a criminal sentence, in that it is not subject to mitigation should the contemner comply with the court order.
3. **Contempt: Collateral Attack: Appeal and Error.** In contempt cases punitive sanctions are reviewable by appeal, whereas coercive sanctions can only be attacked collaterally by habeas corpus.
4. **Contempt.** A criminal or punitive sanction is invalid if imposed in a proceeding that is instituted and tried as a civil contempt.
5. _____. In contempt proceedings, an unconditional penalty is criminal in nature because it is solely and exclusively punitive in character.
6. **Contempt: Judgments: Child Support.** A punitive contempt sanction imposed by a trial court in a child support case must be set aside when the commitment to jail is to take effect in futuro, because such a commitment is a conditional judgment.
7. **Judgments: Final Orders.** A conditional judgment is, as a general rule, wholly void because the judgment does not perform in praesenti and the final effect is left to speculation and conjecture.
8. **Contempt: Child Support.** When a commitment to jail is utilized as a coercive

sanction in a civil contempt proceeding involving willful and contumacious failure to pay child support, a court may sentence the contemner to jail for a specified period, provided the court order permits the contemner to purge himself or herself of contempt and be released from jail upon payment of a reasonable amount of money toward the back child support.

9. **Contempt: Proof.** To be reasonable, the amount of money required to be paid for a contemner to purge himself or herself of contempt of court must be within the contemner's ability to pay. In that regard, the trial court may take into consideration not only the assets and financial condition of the contemner and the contemner's ability to raise money, but also the contemner's ability to earn money through a work release program while the contemner serves the coercive sanction in jail. If a contemner complains that he or she does not have the ability to comply with the purge order, the burden is upon the contemner to prove that inability.
10. **Modification of Decree: Child Support.** The general rule in Nebraska has been to allow a modification of a child support order prospectively from the time of the modification order itself.
11. _____: _____. When a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. Generally, the courts are without authority to reduce the amounts of such accrued payments.
12. _____: _____. Depending upon the equities involved, retroactive modification of a child support order to the filing date of the application for modification may be ordered.
13. **Divorce: Equity.** In Nebraska, dissolution of marriage cases are equitable in nature.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed in part as modified, and in part reversed and remanded with directions.

Philip P. Lyons, of Colfer, Lyons, Wood, Malcom & Goodwin, for appellant.

Michelle J. Oldham, of Mousel Law Firm, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Thomas C. Maddux appeals a civil contempt holding wherein the district court for Red Willow County found him in contempt of court for failure to pay child support as ordered.

In its order of February 16, 1989, the trial court found that

Maddux "has remained in continued contempt of this Court, that unless he pays the amounts due he is sentenced to thirty (30) days in jail commencing April 1, 1989."

We find that the trial court committed plain error when it imposed a punitive sanction rather than a coercive sanction as required in a civil contempt proceeding. We therefore vacate the trial court's punitive sanction and remand the contempt proceeding with direction to the trial court to impose a coercive sanction.

Maddux's ex-wife, Tanya, has cross-appealed the trial court's retroactive reduction in child support Maddux was ordered to pay. We also reverse the trial court on this issue.

THE CONTEMPT PROCEEDINGS

The Supreme Court always reserves the right to correct error unassigned or uncomplained of but which is plainly evident from the record and prejudicially affects a litigant's substantial right, and which if left uncorrected would result in a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process, regardless of whether the error was raised at trial or on appeal. *State v. Nowicki, ante* p. 130, 474 N.W.2d 478 (1991). Here, it is plainly evident from the record that the trial court committed error when it improperly imposed a punitive sanction in a civil contempt proceeding.

The contempt proceeding in this case was instituted by Maddux's ex-wife and was tried as civil, not criminal, contempt. See *State ex rel. Collins v. Beister*, 227 Neb. 829, 420 N.W.2d 309 (1988). This court has made a distinction between civil, or coercive, and punitive sanctions. See, e.g., *McFarland v. State*, 165 Neb. 487, 86 N.W.2d 182 (1957); *In re Contempt of Liles*, 216 Neb. 531, 344 N.W.2d 626 (1984). When a coercive sanction is imposed, "the contemner holds the keys to his jail cell, in that the sentence is conditioned upon his continued noncompliance." *Id.* at 534, 344 N.W.2d at 628. A punitive sanction is akin to a criminal sentence, in that it is not subject to mitigation should the contemner comply with the court order. Such a sanction is a final order and is reviewable on appeal. "The coercive sanction, on the other hand, is always subject to modification by the contemner's conduct; that sanction is not

final in any sense. Therefore, punitive sanctions are reviewable by appeal; whereas coercive sanctions can only be attacked collaterally by habeas corpus." *Id.* at 534, 344 N.W.2d at 629.

Citing *Liles*, this court has dismissed, for lack of an appealable order, appeals based upon lower court findings of contempt for failure to pay child support in civil proceedings. Since the contemner in child support cases is given an opportunity to purge himself or herself of the contempt by paying what the court finds to be a reasonable amount under the circumstances toward the child support arrearages, the contemner "holds the keys to his jail cell" because the sentence is conditioned upon the contemner's continued noncompliance. See, *Rol v. Rol*, 218 Neb. 305, 353 N.W.2d 19 (1984); *Frandsen v. Frandsen*, 216 Neb. 828, 346 N.W.2d 398 (1984).

The issues here are whether Maddux did indeed "hold the keys to his jail cell" and whether the trial court's order fixed a reasonable sum of money under the circumstances for Maddux to pay toward his child support arrearage to purge himself of contempt. The order of the district court in this case provided that "unless [Maddux] pays the amounts due he is sentenced to thirty (30) days in jail commencing April 1, 1989." A criminal or punitive sanction is invalid if imposed in a proceeding that is instituted and tried as a civil contempt. See *In re Contempt of Sileven*, 219 Neb. 34, 361 N.W.2d 189 (1985). The order ceased to be coercive on April 1, 1989, because the jail sentence was no longer subject to mitigation. If the child support amounts due were not paid by April 1, 1989, Maddux was required to serve a punitive 30-day sentence, regardless of whether the amounts were paid subsequent to that date. Maddux no longer would be "holding the keys to his jail cell" after April 1. An unconditional penalty is criminal in nature because it is " 'solely and exclusively punitive in character.' " *Hicks v. Feiock*, 485 U.S. 624, 633, 108 S. Ct. 1423, 99 L. Ed. 2d 721 (1988). The contempt order, as it related to the jail commitment of Maddux, as of April 1, 1989, was a punitive sanction and constituted a final order which is reviewable on appeal.

A punitive contempt sanction imposed by a trial court in a child support case must be set aside when the commitment to jail is to take effect in futuro, because such a commitment is a

conditional judgment. See, *Romshek v. Osantowski*, 237 Neb. 426, 466 N.W.2d 482 (1991); *State v. Wessels and Cheek*, 232 Neb. 56, 439 N.W.2d 484 (1989); *Federal Land Bank of Omaha v. Johnson*, 226 Neb. 877, 415 N.W.2d 478 (1987). A conditional judgment is, as a general rule, wholly void because the judgment does not perform in praesenti and the final effect is left to speculation and conjecture. *Romshek v. Osantowski, supra*. Furthermore, because conditional orders are wholly void, such orders do not mature into a judgment when the conditions specified therein are not met. *Lemburg v. Adams County*, 225 Neb. 289, 404 N.W.2d 429 (1987). In Maddux's case, the contempt commitment was conditional. Consequently, the trial court's order upon entry was a nullity as it related to Maddux's commitment to jail.

When a commitment to jail is utilized as a coercive sanction in a civil contempt proceeding involving willful and contumacious failure to pay child support, a court may sentence the contemner to jail for a specified period, provided the court order permits the contemner to purge himself or herself of contempt and be released from jail upon payment of a reasonable amount of money toward the back child support. See, *Shillitani v. United States*, 384 U.S. 364, 86 S. Ct. 1531, 16 L. Ed. 2d 622 (1966); *Hicks v. Feiock, supra*. Under those circumstances, the contemner will then have "the keys to his or her jail cell." That is because upon the contemner's compliance with the conditions imposed, the contemner must promptly be released from jail, even though the maximum jail time imposed has not been served.

We next turn to the issue of whether the district court's sanction order fixed a definite and reasonable sum of money for Maddux to pay toward his delinquent child support so that he could purge himself of contempt. To be reasonable, the amount of money required to be paid for a contemner to purge himself or herself of contempt of court must be within the contemner's ability to pay. See *Shillitani v. United States, supra*. In that regard, the trial court may take into consideration not only the assets and financial condition of the contemner and the contemner's ability to raise money, but also the contemner's ability to earn money through a work release program while the

contemner serves the coercive sanction in jail. If a contemner complains that he or she does not have the ability to comply with the purge order, the burden is upon the contemner to prove that inability. See *United States v. Rylander*, 460 U.S. 752, 103 S. Ct. 1556, 75 L. Ed. 2d 534 (1983). In Maddux's case, the trial court's order does not disclose whether Maddux, to purge himself of contempt, was required to pay in excess of $42,000 in back child support, which is based upon $1,250 per month from the inception of the decree, or whether Maddux was required to pay the total of the lesser amounts the trial court ordered in earlier contempts. Under the record of this case, either amount was not within Maddux's power to pay.

Since this court is vacating the punitive sanction imposed upon Maddux by the trial court and the cause is being remanded for imposition of a proper coercive sanction, the contempt proceeding here resumes its character as a civil proceeding. As previously stated, the imposition of a coercive sanction is never final and may not be attacked by direct appeal. As a result, we need not address Maddux's assignments of error.

MODIFICATION OF CHILD SUPPORT

In her cross-appeal, Maddux's ex-wife assigns as error the trial court's modification of child support payments retroactive to the date the application to modify was filed. She also asserts that it was error to modify the order at a time when Maddux was in arrears on the payment of his child support obligation.

The general rule in Nebraska has been to allow a modification of a child support order prospectively from the time of the modification order itself. Throughout the past few decades, we have repeatedly stated the rule that when a divorce decree provides for the payment of stipulated sums monthly for the support of a minor child or children, contingent only upon a subsequent order of the court, such payments become vested in the payee as they accrue. Generally, the courts are without authority to reduce the amounts of such accrued payments. See, *Wassung v. Wassung*, 136 Neb. 440, 286 N.W. 340 (1939); *Clark v. Clark*, 139 Neb. 446, 297 N.W. 661 (1941); *Schrader v. Schrader*, 148 Neb. 162, 26 N.W.2d 617 (1947); *Ruehle v. Ruehle*, 161 Neb. 691, 74 N.W.2d 689 (1956); *Ferry v. Ferry*,

201 Neb. 595, 271 N.W.2d 450 (1978); *Eliker v. Eliker*, 206 Neb. 764, 295 N.W.2d 268 (1980); *Conrad v. Conrad*, 208 Neb. 588, 304 N.W.2d 674 (1981); *Scully v. Scully*, 213 Neb. 857, 331 N.W.2d 801 (1983); *Gordon v. Gordon*, 231 Neb. 857, 438 N.W.2d 762 (1989); *Contra Costa Cty. ex rel. Petersen v. Petersen*, 234 Neb. 418, 451 N.W.2d 390 (1990).

In *Wassung, supra*, the defendant had asked to be relieved of liability for payments which had accrued since his December 1937 application for modification of child support. This court upheld the lower court decision which granted a modification, but limited it prospectively to amounts due after April 1939. The court stated that it was without authority to reduce the amounts retrospectively. " '[T]he modifying decree relates to the future only *and from the time of its entry*.' " (Emphasis supplied.) *Wassung, supra* at 443, 286 N.W. at 342.

Upon occasion, depending upon the equities involved, this court has approved modification of a child support order retroactive to the filing date of the application for modification. In *Goodman v. Goodman*, 173 Neb. 330, 113 N.W.2d 202 (1962), all child support payments which accrued after the date of filing for a modification were canceled. *Goodman* was a case in which the mother had deliberately removed the children from this state for the express purpose of keeping them from their father. Because neither her ex-husband nor the clerk of the court knew her whereabouts, she "deprived the children of the benefit of the support payments." *Id.* at 335, 113 N.W.2d at 205. Thus, "[u]nder the circumstances of this case, it was proper for the court to cancel the payments which accrued after the filing of the application to modify the judgment." *Id.* at 336, 113 N.W.2d at 205.

There have been other circumstances in which a retroactive modification was allowed. See, e.g., *Smith v. Smith*, 201 Neb. 21, 265 N.W.2d 855 (1978); *Williams v. Williams*, 206 Neb. 630, 294 N.W.2d 357 (1980) (doctrine of equitable estoppel held applicable to defeat claims for accrued child support payments where natural father reasonably believes that adoption of child has been completed); *Berg v. Berg*, 238 Neb. 527, 471 N.W.2d 435 (1991) (credit allowed for amounts due for support of a child for a period of time in which the child resided with the

noncustodial parent); *Contra Costa Cty. ex rel. Petersen v. Petersen, supra* (respondent credited for monthly payments made directly to the custodial parent by respondent's parents).

In Nebraska, dissolution of marriage cases are equitable in nature. *Ohler v. Ohler*, 220 Neb. 272, 369 N.W.2d 615 (1985). And one who comes into equity must come with clean hands. *Id.* These rules extracted from *Ohler, supra*, apply not only in original dissolution proceedings, but also in proceedings for modification of the decree of dissolution. See *Ohler, supra*.

In those cases where we have permitted reduction in child support retroactive to the date of filing the petition, the payor generally had acted in good faith in attempting to meet the payor's obligation to pay child support. That cannot be said for Maddux.

During a 2 1/2-year span, from October 1986 to February 1989, Maddux earned in excess of $27,000, but paid only $1,050, or a mere 4 percent, of his gross income for the support of his five minor children. The chronology of events reflects that Maddux made most of his payments during that 2 1/2-year span in response to contempt proceedings. Maddux would tender a token payment followed by a lengthy timespan in which Tanya received nothing by way of child support, and the process would begin again. In the summer of 1988, for 3 months, Maddux earned $2,000 gross per month, with take-home pay of $1,600. During the same period, he paid only a total of $600 toward his child support obligation. For the calendar year 1988 Maddux's income was in excess of $12,000, while his total payment on child support for his five children was $700. At the time of the modification hearing, Maddux was delinquent in his child support payments in excess of $42,000. The record further reflects that he had never maintained health insurance on his five children as he was ordered to do. That chore fell upon Tanya's parents. The meager amounts Maddux paid on his child support obligation, coupled with the timing of those payments, reflect that Maddux was not acting in good faith. Maddux, at the time of the modification of child support hearing, did not enter the trial court with clean hands. On the other hand, Tanya, unlike the payees in some of the cases wherein we granted retroactive reductions in child support,

walked into the court with clean hands. The balance of equities in this case precludes Maddux from obtaining a modification of child support payments retroactive to the date he filed his application for modification.

Tanya's second assignment of error on cross-appeal is without merit. She argues that under *Voichoskie v. Voichoskie*, 215 Neb. 775, 340 N.W.2d 442 (1983), *appeal after remand* 219 Neb. 670, 365 N.W.2d 467 (1985), equitable estoppel bars the modification of child support payments when the payments are in arrears due to the willful misconduct of the payor. In *Voichoskie*, we determined that the doctrine of unclean hands can be invoked to bar the petitioner's claim for relief when the "evidence shows that [he] is able to pay the arrearage or is unable to pay through some intentional conduct on his part." 215 Neb. at 779, 340 N.W.2d at 445.

In this case, as in *Voichoskie v. Voichoskie, supra*, the paying father has alleged an inability to make the payments ordered and alleged a change in circumstances since the time of the original order. In *Voichoskie*, we held that was sufficient for the application to be heard on its merits. The record here reflects that due to a substantial change in circumstances Maddux was entitled to a reduction in his child support obligation. While Maddux's unclean hands prevent him from obtaining a retroactive reduction, such should not be invoked to bar him from a prospective reduction in child support. Tanya's second assignment of error is meritless.

The punitive sanction imposed in this case is vacated, and this cause is remanded to the district court with instructions to impose a civil sanction in connection with its finding that Maddux is in contempt of that court. The trial court's order reducing child support is hereby modified to affect only those support payments coming due after February 16, 1989.

AFFIRMED IN PART AS MODIFIED, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

MELVIN SCHMIDT, APPELLANT, V. SHOFTSTALL ALFALFA ET AL., APPELLEES.

475 N.W.2d 523

Filed October 11, 1991. No. 90-900.

1. **Workers' Compensation: Appeal and Error.** A direct appeal to the Supreme Court from the order of a single judge of the Workers' Compensation Court is not authorized.
2. **Workers' Compensation: Judgments: Time.** An application for rehearing following the hearing before a single judge of the Workers' Compensation Court must be filed within 14 days after the date of the order of the single judge.
3. _____: _____: _____. A failure to file an application for a rehearing within 14 days after the date of the order of a single judge results in the order of the single judge becoming final and conclusive upon all parties in interest.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Richard L. Alexander, of Alexander Alexander & Alexander, for appellant.

Richard R. Endacott, of Knudsen, Berkheimer, Richardson & Endacott, for appellees.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

The plaintiff, Melvin Schmidt, has appealed from the order of the Workers' Compensation Court dismissing his application for rehearing.

The record shows that following a hearing before a single judge of the Workers' Compensation Court, the plaintiff's petition for compensation was dismissed on June 18, 1990. On July 3, 1990, the plaintiff filed an application for rehearing in the compensation court.

Neb. Rev. Stat. § 48-179 (Reissue 1988) requires that applications for rehearing must be filed within 14 days after the date of the order of the single judge of the compensation court. In this case the application for rehearing was filed on the 15th day after the order of the single judge and thus was out of time. As stated in *Dolner v. Peter Kiewit & Sons Co.*, 143 Neb. 384, 387, 9 N.W.2d 483, 485 (1943):

> The failure to file the application for rehearing within the statutory 14-day period caused the order of dismissal of the compensation judge to become "conclusive upon all parties at interest." See *Duering v. Village of Upland*, 125 Neb. 659, 251 N.W. 819; *Swanson v. Village of Shickley*, 125 Neb. 664, 251 N.W. 821.

The plaintiff contends, however, that a plaintiff may appeal directly to this court from the order of a single judge and he was not required to first request a rehearing before a three-judge panel of the compensation court.

There are no provisions in the statutes for a direct appeal to this court from the order of a single judge nor any procedures for such an appeal. Neb. Rev. Stat. § 48-182 (Reissue 1988) states that a party in interest may appeal to this court after rehearing within 30 days of the compensation court's order on rehearing. It does not provide for an appeal to this court from the order of a single judge.

Neb. Rev. Stat. § 48-185 (Reissue 1988) provides the procedure for appeal to this court from the compensation court. It states:

> Any appeal from the judgment of the Nebraska Workers' Compensation Court after a rehearing shall be prosecuted and the procedure . . . shall be in accordance with the general laws of the state and procedures regulating appeals in actions at law from the district courts to the Supreme Court . . . . The proceedings to obtain a reversal, vacation, or modification of judgments, awards, or final orders made by the compensation court after a rehearing shall be by filing in the office of the clerk of the Nebraska Workers' Compensation Court within thirty days after the rendition of such judgment or decree, or the making of such final order, a notice of intention to prosecute such appeal . . . .

The statutory provisions are clear that any party who refuses to accept the ruling of the single judge after the original hearing may file an application for rehearing before a three-judge panel within 14 days after the date of the single judge's order. If a claimant does not file an application for a rehearing with the compensation court within 14 days after the date of the single

judge's order, the order becomes conclusive and final. See, Neb. Rev. Stat. § 48-170 (Reissue 1988); *Dolner v. Peter Kiewit & Sons Co., supra.*

Because the plaintiff failed to file his application for rehearing within the 14-day period provided in § 48-179, the three-judge panel was without jurisdiction to hear the case, and the compensation court did not err by dismissing his application.

The judgment is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

IN RE INTEREST OF R.R., A CHILD UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. D.F., APPELLANT.
475 N.W.2d 518

Filed October 11, 1991. No. 90-1027.

1. **Juvenile Courts: Parental Rights: Final Orders: Appeal and Error.** A temporary detention order entered after a hearing, pursuant to Neb. Rev. Stat. §§ 43-247(3)(a) and 43-254 (Reissue 1988), is final and appealable.
2. **Records: Appeal and Error.** It is incumbent on the party appealing to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court is to be affirmed.
3. **Pretrial Procedure.** Control of discovery is a matter for judicial discretion.
4. **Pretrial Procedure: Proof: Appeal and Error.** The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion.
5. **Appeal and Error.** Error without prejudice provides no ground for appellate relief.
6. **Juvenile Courts: Parental Rights: Due Process: Right to Counsel.** To determine whether due process requires the assistance of counsel in an adjudication proceeding under Neb. Rev. Stat. §§ 43-247(3)(a) and 43-254 (Reissue 1988), the court must weigh the interest of the parent, the interest of the State, and the risk of erroneous decision given the procedures in use.

Appeal from the District Court for Seward County, BRYCE BARTU, Judge, on appeal thereto from the County Court for Seward County, ALAN G. GLESS, Judge. Judgment of District Court affirmed.

Sandra Hernandez Frantz for appellant.

C. Jo Petersen, Seward County Attorney, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

D.F., the natural mother of R.R., a minor child, appeals from an order of the district court, which affirmed the order of the juvenile court adjudicating the minor to be a juvenile in need of assistance under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988). This section refers to a juvenile "who is in a situation . . . injurious to the health or morals of such juvenile."

The mother assigns as error the actions of the trial court in (1) proceeding to trial on an insufficiently specific petition, (2) denying her certain discovery, and (3) proceeding with a temporary detention hearing in the absence of her counsel. She claims that all three of these assigned errors violated her right to due process "under the Fifth and Fourteenth Amendments of the U.S. Constitution." Brief for appellant at 4. We affirm.

R.R. was born on January 30, 1981, to the mother and E.R. (natural father), whose marriage was dissolved by a June 7, 1985, decree. The mother was awarded sole custody of the child. In December 1985, the mother married R.F. (stepfather), with both of whom the child resided until entry by the juvenile court of a temporary detention order on March 1, 1989.

The minor testified that she was sexually assaulted on a number of occasions by her stepfather and adult stepbrother. She also testified that these two men threatened to harm her if she told anyone about the abuse. A psychologist who was treating the minor child before and during the adjudication proceedings, the child's Department of Social Services caseworker, and one of her schoolmates corroborated her testimony.

The child's half sister testified that she had seen the natural father sexually abusing the child on one occasion in 1984, when the mother and natural father were still married.

There was also testimony from the child that she told her mother of the sexual abuse by her stepfather and stepbrother.

The mother ejected the two men from the family home when she was first informed of the sexual abuse, but both the stepfather and stepbrother returned within a day. The psychologist and the caseworker corroborated this testimony. According to the child, her mother did not believe her when she later told about continuing sexual abuse.

Medical evidence showed that the minor child had been sexually penetrated, with the most recent activity occurring in or before January 1989.

The mother does not argue that the evidence is not sufficient to establish by a preponderance of the evidence that the child was a juvenile requiring assistance under § 43-247(3)(a). We hold that it is.

We first consider the mother's contention relating to the insufficiency of the petition. Although the petition does not appear in the record, apparently the Seward County Attorney filed a petition for an adjudication that the minor child was a juvenile in need of assistance or supervision under § 43-247(3)(a). The county court for Seward County, sitting as a juvenile court, held a temporary detention hearing on March 1, 1989. The mother was present without counsel at the temporary detention hearing, and requested a continuance due to her attorney's conflicting court schedule. The mother stated that she contacted her attorney as soon as the mother received notice of the hearing, which she stated was on "[F]riday." She did not specify the date on which she received notice. Although there is no certificate of service of summons in the record, the trial court noted that the sheriff's return showed delivery of the summons to the mother on February 17, 1989, some 12 days before the scheduled hearing.

The court recessed and contacted the mother's attorney, who advised the court that she had not been retained by the mother until the night before the hearing and had not entered into a fee or retainer agreement with the mother.

The State contends that the mother's assignments of error regarding the adequacy of the petition and regarding the claimed denial of counsel refer to the temporary custody order and are not appealable. We reject the State's contention in that regard. Although an ex parte temporary detention order

keeping a juvenile's custody from his or her parent for a short period of time is not final, one entered under § 43-247(3)(a) and Neb. Rev. Stat. § 43-254 (Reissue 1988), after a hearing which continues to keep a juvenile's custody from the parent pending an adjudication hearing to determine whether the juvenile is neglected, is final and thus appealable. See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991).

As previously stated, the petition was not made a part of the record. It is incumbent upon the party appealing to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court is to be affirmed. *Abboud v. Cutler*, 238 Neb. 177, 469 N.W.2d 763 (1991). See *Bert Cattle Co. v. Warren*, 238 Neb. 638, 471 N.W.2d 764 (1991). We cannot evaluate the sufficiency of a petition which does not appear in the record. Therefore, the assignment of error alleging the inadequacy of the petition cannot be considered. However, we would observe that during preliminary proceedings prior to the adjudication hearing, in response to the request of the mother's attorney for a bill of particulars, the court required the State to commit on the record that at the adjudication hearing it would rely only on the allegations supported by the evidence in the detention hearing. The court advised the mother's attorney that she was free to request a transcript of those proceedings to review the allegations.

The mother argues that her ability to prepare a defense was hindered by the denial or limitation of discovery, in violation of her right to due process. Specifically, she claims she was erroneously denied a bill of particulars, a motion to produce, a motion to compel, and the production of material a witness used to refresh her memory. Further, the mother claims error in that the deposition of her child was scheduled by the trial court too near the time of trial and that the conditions the trial court attached to this deposition were overly restrictive.

The discovery the mother claims she was wrongfully denied was attempted between the temporary detention hearing and the trial court's May 4, 1989, order that the case proceed thereafter under the "Nebraska Discovery Rules for Civil Cases." The trial court reviewed the mother's attempted

discovery and characterized it as "a strange mixture of criminal discovery and civil discovery [which] just plain wasn't done correctly." The trial court gave the mother the opportunity to begin discovery afresh under the civil discovery rules, and promised to enforce properly promulgated discovery.

"Control of discovery is a matter for judicial discretion." *D.S. v. United Catholic Soc. Servs.*, 227 Neb. 654, 666, 419 N.W.2d 531, 538 (1988). The party asserting error in a discovery ruling bears the burden of showing that the ruling was an abuse of discretion. *Id.* Upon the record before us, we cannot say that the trial court abused its discretion in its discovery ruling. The record does not contain the mother's motion for a bill of particulars, her motion to produce (which was apparently only served upon opposing counsel and not filed in court), her motion to compel, or any motion for production of the material used by the State's witness to refresh her recollection. Without reviewing the mother's discovery motions, we cannot determine whether the trial court erred in denying them and requiring her to proceed under the civil discovery rules. Once again, the mother has failed to provide a record upon which this court can adjudicate her claim of error. See, *Abboud v. Cutler, supra*; *Bert Cattle Co. v. Warren, supra*.

Moreover, "error without prejudice provides no ground for appellate relief." *In re Interest of D.L.S.*, 230 Neb. 435, 438, 432 N.W.2d 31, 35 (1988). The mother has not demonstrated that she was prejudiced in any way by the trial court's denial of the preliminary discovery enumerated by her. The civil rules allow broad inquiry, and surely the mother could have obtained any information to which she would be entitled. In any event, the court gave her a second chance to conduct discovery with the promise that properly promulgated discovery would be enforced. The mother does not contend that the trial court entered any erroneous ruling, prejudicial to her, on discovery questions arising after the court's May 4 order. She had the opportunity to rectify any earlier error in the trial court's discovery rulings, and it is not error on the part of the trial court if she did not avail herself of this opportunity.

It is also argued by the mother that the trial court scheduled her minor child's deposition so close to the trial date and under

such restrictive conditions as to deny the mother effective discovery. The mother fails to specify how the conditions—a neutral site, no face-to-face contact between the child and any person alleged to have neglected or abused her, and the requirement that a health care professional with the power to stop the deposition be present—hindered her ability to gather evidence or preserve testimony for trial. The mother made no motion to continue the trial date or to advance the deposition in order that she have more time to prepare between the deposition and the trial if that was needed. The trial court did not abuse its discretion in scheduling or limiting the child's deposition.

The mother argues that the trial court's decision to hold the temporary detention hearing in the absence of her counsel violated the mother's right to due process. To determine whether due process requires the assistance of counsel in this type of proceeding, we must weigh the interest of the parent, the interest of the State, and the risk of erroneous decision given the procedures in use. *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) (applying *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), to termination of parental rights proceedings).

We have previously held that such a situation requires the presence of counsel in termination of parental rights proceedings. *Orr v. Knowles*, 215 Neb. 49, 337 N.W.2d 699 (1983) (explaining *State v. Caha*, 190 Neb. 347, 208 N.W.2d 259 (1973)). Under this analysis, where the parent's interest is at its highest and the State's interest at its lowest, due process may require counsel's presence in order to proceed. *Lassiter, supra.*

Termination of parental rights, as in *Lassiter* and *Caha*, embodies perhaps the most important point of the parent's interest; the parent stands to be permanently deprived of his or her fundamental parental rights. The State's interest is in protecting the health, safety, and welfare of the child. The stakes affected by an erroneous decision are high—the parent's rights in the child are severed completely and permanently. The holdings of *Lassiter* and *Caha* recognize that in this situation, due process prohibits proceeding without counsel.

A temporary detention hearing presents a different

situation. The parent's interest is diminished because termination of parental rights is not at issue. The parent may simply be required to make reasonable efforts under a court-ordered plan to correct the conditions giving rise to the adjudication. See Neb. Rev. Stat. § 43-292(6) (Reissue 1988). The State's interest in protecting the child from any deleterious effects of parental abuse or neglect, on the other hand, is as important at this stage in the proceedings as at any other. An erroneous decision, while no more or no less likely than at any other stage of the proceedings, does not permanently or completely sever parental rights. The parent has an opportunity to rectify any error at the adjudication hearing, with no permanent consequences ever having accrued.

In this case, the trial court took a significant step to ensure that the absence of the mother's counsel from the temporary detention hearing would not result in an erroneous decision against her interest. The court, at the adjudication hearing on August 31, 1989, took judicial notice of all prior testimony in the matter, but specifically refused to take notice of the testimony given when the mother's counsel was not present. This step effectively quarantined the temporary detention hearing from the remainder of the adjudication proceedings, and error that the trial court committed in proceeding with the temporary detention hearing without the mother's counsel present could therefore not infect the ultimate decision.

Furthermore, the mother was at least partially at fault for her lack of counsel at the temporary detention hearing. Despite receiving notice on February 17 of the March 1 hearing, she did not contact counsel until the night before the hearing and did not agree upon counsel's compensation. Moreover, the trial court twice informed the mother of her right to appointed counsel, but the mother did not request an appointed attorney. She did not avail herself of an opportunity to assert the right to counsel she now claims was erroneously denied her.

In this case, the mother was without counsel at the temporary detention hearing because the trial judge denied her motion for a continuance so that her attorney could be present. The court proceeded because of the emergency nature of the case. The mother's rights in her child were not terminated at the

temporary detention hearing, nor at any other stage in the proceedings. The mother was represented by counsel at all court appearances subsequent to the temporary detention hearing. At the adjudication hearing the mother, by counsel, cross-examined the State's witnesses and presented nine witnesses of her own over 2 days. She could have called at the adjudication hearing any witness who testified at the temporary detention hearing to clarify or impeach the prior testimony of the witness. Based upon the balance of the competing interests and considering the procedures used in this case, due process did not require the presence of the mother's counsel at the temporary detention hearing.

The judgment of the district court is hereby affirmed.

AFFIRMED.

ARTHUR KRAFT, APPELLEE, V. PAUL REED CONSTRUCTION & SUPPLY, INC., ET AL., APPELLANTS.

475 N.W.2d 513

Filed October 11, 1991. No. 90-1202.

1. **Workers' Compensation.** If a work-related injury is limited to a specific body member, a workers' compensation claimant is limited to the scheduled compensation provided under Neb. Rev. Stat. § 48-121(3) (Reissue 1988).
2. _____. An exception to a Neb. Rev. Stat. § 48-121(3) (Reissue 1988) specific-member injury exists when an unusual or extraordinary condition as to other members or other parts of the body has developed; in such an event, a claimant is entitled to compensation based on lost earning capacity as provided under subsection (1) or (2) of the statute.
3. _____. A workers' compensation claimant may be allowed compensation for neurosis if it is a proximate result of his or her injury and results in disability.
4. _____. In a work-related accident there is no requirement that an unusual or extraordinary condition be physical; the disabling condition must only be the proximate result of the work-related accident.
5. **Workers' Compensation: Appeal and Error.** Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1988), the Nebraska Supreme Court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent

evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the compensation court do not support the order or award.

6. _____: _____. The findings of fact made by the Workers' Compensation Court have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
7. _____: _____. In testing the sufficiency of evidence to support findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party.
8. **Workers' Compensation.** The Workers' Compensation Court, as the trier of fact, is the sole judge of the credibility of witnesses and weight to be given testimony.
9. **Workers' Compensation: Appeal and Error.** The Nebraska Supreme Court may not substitute its judgment for that of the Workers' Compensation Court but, rather, may simply review the decision for error.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Steven W. Olsen, of Simmons, Olsen, Ediger & Selzer, P.C., for appellants.

G. Kirk Meade, of Nichols, Douglas, Kelly and Arfmann, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

The defendant-appellant employer, Paul Reed Construction & Supply, Inc., and its insurer, defendant-appellant General Casualty Company, contend that the evidence does not support the 50-percent loss of earning power benefit the Nebraska Workers' Compensation Court awarded the plaintiff-appellee employee, Arthur Kraft. We affirm.

It is unquestioned that on July 14, 1987, the then 63-year-old Kraft was involved in an accident arising out of and in the course of his employment as a carpenter with Paul Reed Construction when he was kicked and punched by a fellow employee and caused to fall over a pile of lumber. As a consequence of the assault, Kraft suffered a variety of injuries, including internal bleeding, wounds to his head and to an elbow, and damage to the left bursa over the greater trochanter. The greater trochanter is the "bony prominence" of the femur,

or thigh bone, which can be felt just below the beltline on the hip. The bursa is "a thin, filmy sac that acts as a lubricant or a bearing . . . between bone and tendon." There is medical evidence that the permanent effects of Kraft's injuries are limited to a 10-percent permanent partial disability of his left leg. There is other medical opinion that Kraft's physical limitations amount to a 5-percent disability of the body as a whole. Because of the pain he claims to experience in his left hip and back, Kraft has not worked since the accident. In addition, he has significantly decreased his physical activity; he no longer fishes or hunts, and he avoids any exertion which requires bending, stooping, climbing, or lifting.

On December 11, 1989, approximately 2½ years after the accident and only 2 days before the initial hearing in this case, Kraft, for the first and only time, consulted a psychiatrist. The psychiatrist expressed the opinion that Kraft's continued pain was caused by the conversion of his psychological trauma into physical symptoms. In this witness' words:

> [S]ince [Kraft] sees things in physical terms, if his body worked he'd probably be able to say I could work and perhaps it wouldn't cause him the distress that I assume that it would. But I see so much of the secondary or accompanying psychiatric distress that I think it would be hard for him to do that with a sense of competence and confidence. . . .

The psychiatrist described Kraft's traumatic neurosis as an "extraordinary" reaction to the stress he has faced, and concluded that Kraft's prognosis was poor, explaining that "[i]f there was good physical restoration, in my opinion, he would still need psychiatric intervention, psychotherapy medications because my experience has been there would be yet another reason why he couldn't [work] or [work] well." In the psychiatrist's opinion, not only was Kraft's self-confidence shaken, but his "defenses have basically been overwhelmed," and, as a consequence, the psychiatrist did "not see him functioning in a competitive environment or workplace, particularly considering his age."

An employment counselor concluded that Kraft could not be rehabilitated, expressing the view that Kraft "is not employable

in the competitive labor market and would have a total loss of earning capacity." A physical therapist also questioned whether Kraft would ever be able to work again.

Defendants' claim of error is based on the contentions that as Kraft's permanent physical impairment is to the left leg alone, and because his complaints qualify as neither unusual nor extraordinary consequences of the injury to the leg, the resulting condition is compensable only as a partial disability of the leg as a scheduled member under the provisions of Neb. Rev. Stat. § 48-121 (Reissue 1988), and not as a disability of the body as a whole.

Section 48-121 provides that if a work-related injury is limited to a specific body member, a workers' compensation claimant is limited to the scheduled compensation provided under subsection (3) of the statute. See *Yager v. Bellco Midwest*, 236 Neb. 888, 464 N.W.2d 335 (1991). An exception to a subsection (3) specific-member injury exists when an unusual or extraordinary condition as to other members or other parts of the body has developed. In such an event, a claimant is entitled to compensation based on lost earning capacity as provided under subsection (1) or (2) of the statute. *Jeffers v. Pappas Trucking, Inc.*, 198 Neb. 379, 253 N.W.2d 30 (1977). As recently observed, in the event of body-as-a-whole disabilities, the basis for compensation "is determined by the employee's diminution of employability or impairment of earning power or earning capacity, and is not necessarily determined by a physician's evaluation and assessment of the employee's loss of bodily function." *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 470, 461 N.W.2d 565, 573 (1990). However, "[g]eneral disabilities which are the normal, usual, and logical consequence of injuries to specific members" are compensable only according to the fixed statutory member schedule. *Mead v. Missouri Valley Grain, Inc.*, 178 Neb. 553, 559, 134 N.W.2d 243, 248 (1965).

In addition to physical impairments, psychological injuries are compensable. See, *Johnston v. State*, 219 Neb. 457, 364 N.W.2d 1 (1985); *Van Winkle v. Electric Hose & Rubber Co.*, 214 Neb. 8, 332 N.W.2d 209 (1983); *Lee v. Lincoln Cleaning & Dye Works*, 145 Neb. 124, 15 N.W.2d 330 (1944); *Davis v.*

Western Electric, 210 Neb. 771, 779, 317 N.W.2d 68, 73 (1982) ("a claimant may be allowed compensation for neurosis if it is a proximate result of her injury and results in disability"). In such cases, the burden is on the claimant to "prove by a preponderance of the evidence that his disability is the result of an accident arising out of his employment." *Riha v. St. Mary's Church & School, Inc.*, 209 Neb. 539, 542-43, 308 N.W.2d 734, 737 (1981).

Thus, assuming, but not deciding, that defendants are correct in contending that the evidence establishes a physical disability of the left leg alone, they cannot prevail unless it can be said as a matter of law that Kraft's traumatic neurosis is neither an unusual or extraordinary consequence of his leg injury nor otherwise compensable. While it is true that the psychiatrist testified that he was not "surprised" by Kraft's reaction to the injury and that Kraft himself testified that if he was physically fit he would return to work, there is the psychiatrist's testimony that Kraft's reaction, in comparison to that of an average person, was extraordinary. The psychiatrist emphasized Kraft's inability to understand his own psychological condition, noting that Kraft has a tendency to deny his inadequacies. Finally, the psychiatrist stated that Kraft would not be able to resume work, even if he had physically recovered, without psychological counseling.

Defendants next assert that an unusual or extraordinary condition must be physical in nature, and, consequently, a mental illness does not satisfy the exception. This argument ignores the clear language of this court. In *Cardenas v. Peterson Bean Co.*, 180 Neb. 605, 608, 144 N.W.2d 154, 157 (1966), we declared that "a workman is entitled to recover compensation for neurosis if it is a proximate result of his injury and results in disability." To substantiate their argument, defendants cite *Scamperino v. Federal Envelope Co.*, 205 Neb. 508, 513, 288 N.W.2d 477, 480 (1980), where this court stated that an unusual or extraordinary condition must be to "other members or other parts of the body." The court, however, has not interpreted this language so narrowly as to exclude psychological impairments. "Where . . . the evidence is sufficient to permit the triers of fact to find that [a]

psychological injury is directly related to the accident and the employee is unable to work, the employee is entitled to be compensated." *Johnston v. State, supra* at 466, 364 N.W.2d at 7. Contrary to defendants' contention, there is no requirement that the unusual or extraordinary condition be physical; the disabling condition must only be the proximate result of the work-related accident.

Defendants further argue that there is no causal relationship between the psychiatrist's diagnosis and Kraft's physical condition. It is true that 2 1/2 years passed before any psychiatric diagnosis was made and that Kraft did not claim to be depressed or interested in psychiatric therapy. It is also true, however, that others identified symptoms of Kraft's neurosis prior to the psychiatrist's involvement. A rehabilitation specialist mentioned as early as July 29, 1988, that Kraft was "frustrated at his lack of progress." On January 24, 1989, an orthopedist observed that the "patient has developed some traumatic neuroses . . . ." The orthopedist noted, on October 24, 1989, that a "more serious effect on . . . Kraft results from his emotional response."

Physical injury and the subsequent stress similar to that suffered by Kraft has been found to be the proximate cause of traumatic neurosis:

> A conversion reaction occurs when a person who is under some type of stress handles anxiety by developing a physical defect. There is no organic basis to explain the disorder exhibited. Compensation may be recovered for emotional or psychological conditions which are proximately caused by a work-related injury and result in disability.

Van Winkle v. Electric Hose & Rubber Co., supra at 10, 332 N.W.2d at 210. The psychiatrist attributed Kraft's traumatic neurosis not only to his physical injury, but also to the psychological loss resulting from his immobility and inability to work, and expressly stated that Kraft's neurotic response was proximately caused by the injury.

As we have repeatedly pointed out, pursuant to Neb. Rev. Stat. § 48-185 (Reissue 1988), the Supreme Court may modify, reverse, or set aside a Workers' Compensation Court decision

only when

> (1) the compensation court acted without or in excess of its powers, (2) the judgment, order, or award was procured by fraud, (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award, or (4) the findings of fact by the compensation court do not support the order or award.

§ 48-185. We have also held that the findings of fact made by the compensation court have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Cline v. County Seat Lounge*, *ante* p. 42, 473 N.W.2d 404 (1991). Moreover, in testing the sufficiency of evidence to support findings of fact made by the compensation court, the evidence must be considered in the light most favorable to the successful party. *Id.* Further, the compensation court, as the trier of fact, is the sole judge of the credibility of witnesses and weight to be given testimony. *Id.* In short, the Supreme Court may not substitute its judgment for that of the compensation court but, rather, "simply review[s] the decision for error." *Hare v. Watts Trucking Service*, 220 Neb. 403, 408, 370 N.W.2d 143, 147 (1985).

Under the state of the record, it cannot be said the compensation court's award was clearly wrong. Accordingly, we affirm and, pursuant to the provisions of Neb. Rev. Stat. § 48-125 (Reissue 1988), order that defendants pay Kraft the sum of $750 toward the services of his attorney in this court.

We also hereby establish a rule of practice and direct that in an appeal of any type of case filed after December 31, 1991, in this court or the Court of Appeals, any party who claims entitlement under the law or a uniform course of practice to an attorney fee shall, at the time of filing his, her, or its brief, also file a separate claim for such fees supported by an affidavit which justifies the amount sought.

AFFIRMED.

IN RE INTEREST OF D.A., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. R.A., APPELLANT.

475 N.W.2d 511

Filed October 11, 1991. No. 91-162.

1. **Juvenile Courts: Parental Rights: Proof.** The fact that a juvenile comes within the purview of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) must be established by a preponderance of the evidence.
2. **Courts: Mental Competency: Guardians Ad Litem.** Even where there is no statutory requirement that such be done, it is within the inherent power of courts, and is both proper and desirable, that they appoint a guardian ad litem for a litigant when reasonably convinced the litigant is not mentally competent to comprehend the significance of legal proceedings, the litigant is unable to intelligently and understandingly participate in the protection of her or his best interests, and such a guardian is needed to protect those interests.

Appeal from the District Court for Hall County, WILLIAM H. RILEY, Judge, on appeal thereto from the County Court for Hall County, RICHARD E. WEAVER, Judge. Judgment of District Court affirmed.

Hal W. Anderson, of Berry, Anderson, Creager & Wittstruck, P.C., for appellant.

Mark J. Young, Deputy Hall County Attorney, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

The county court, sitting as a juvenile court, adjudged D.A., a boy born December 11, 1985, to be within its jurisdiction and placed his temporary custody in the Department of Social Services and his physical possession with his father. The appellant mother, R.A., assigns the district court's affirmance of the juvenile court's adjudication as error, asserting that the district court should have held the evidence insufficient to support the juvenile court's findings. We affirm.

Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) provides, in relevant part, that a juvenile court shall have jurisdiction over one less than 18 years of age who, among other things, "lacks proper parental care by reason of the fault or habits of his or her parent . . . or who is in a situation . . . injurious to the health or

morals of such juvenile . . . ." The State alleged the boy came within the juvenile court's jurisdiction under both of the aforestated statutory grounds.

When the boy's parents were divorced, at a time undisclosed by the record, the boy's care, custody, and control were placed in the mother. The father was granted visitation rights. The State filed the petition giving rise to this action on May 7, 1990, because of its concern that the boy was being harmed by his mother's unfounded belief and excessive concern that the boy was being sexually abused by his father and members of his father's family.

The record reveals that the mother has made a number of sexual abuse complaints concerning the boy to a variety of law enforcement agencies; there is no evidence that any of these complaints have resulted in charges against the father or anyone else. The record also reveals that in an effort to establish her fixation as fact, she has caused the boy to be examined numerous times by a number of physicians. None of these examinations established sexual abuse.

However, a social worker who saw the boy at the mother's request believed that both he and his stepbrother, while visiting the father, were inappropriately touched by the 12-year-old daughter of a babysitter. The social worker was nonetheless of the opinion that the mother's allegations against the father were unfounded and that the mother coached the boy as to what to say about sexual abuse. This witness concluded that the mother's conduct would have a "[t]raumatic impact" on the boy, stating:

> It is in essence victimizing him, forcing him to focus on his sexuality and giving him the damage, what we call the "damaged goods image" in terms of him viewing himself that something must be wrong with him. So they must be wrong with his genitalia. And that his self perception would be that he is damaged. That he cannot trust anyone. That he is being hurt.

The clinical psychologist who saw the boy and mother upon the social worker's referral testified that in his opinion the mother is sufficiently mentally ill as to be unable to help the boy develop healthy relationships with other people, develop a

healthy self-image, and move away from an "enmeshed relationship with her." His examination of the boy revealed that he had a very difficult time with independence and that he was overly inhibited. In terms of his ability to play, this witness found the boy to be developmentally behind where he should be at his age. It was the clinical psychologist's opinion that these problems will continue to grow unless steps are taken to correct them. This witness was also concerned with the boy's interest in sexuality and was of the opinion the boy was having a fairly traumatic reaction to his current situation, but could not say whether that reaction was the result of being separated from his mother and family, of being involved with the system, or of being, when he was temporarily in a child-care facility, in the "chaos of a new environment with lots of children."

The psychologist the mother consulted found her to have a personality disorder which denies her good insight and prevents her from accurately perceiving and describing prior events.

The fact that a juvenile comes within the purview of § 43-247(3)(a) must be established by a preponderance of the evidence. See *In re Interest of L.D. et al.*, 224 Neb. 249, 398 N.W.2d 91 (1986). From our de novo review of the record, see *In re Interest of M.P.*, 238 Neb. 857, 472 N.W.2d 432 (1991), we are persuaded the evidence preponderates in favor of a finding that irrespective of whether the mother has the ability to act other than she does, the boy would nonetheless, if left in her custody and possession, be in a situation injurious to his mental and physical health.

The evidence in this case calls into question some of the mother's mental abilities. Even where there is no statutory requirement that such be done, it is within the inherent power of courts, and is both proper and desirable, that they appoint a guardian ad litem for a litigant when reasonably convinced the litigant is not mentally competent to comprehend the significance of legal proceedings, the litigant is unable to intelligently and understandingly participate in the protection of her or his best interests, and such a guardian is needed to protect those interests. *Graham v. Graham*, 40 Wash. 2d 64, 240 P.2d 564 (1952). See *In Re Kenison's Guardianship*, 72 S.D. 180, 31 N.W.2d 326 (1948). Since the evidence does not suggest

that the mother was incapable of understanding the significance of the subject proceedings or lacked the ability to intelligently and understandingly participate in the protection of her interests, the juvenile court did not abuse its discretion in failing to appoint a guardian ad litem for her.

The judgment of the district court is affirmed.

AFFIRMED.

ECONOMY HOUSING COMPANY, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. RONALD ROSENBERG, APPELLEE AND CROSS-APPELLANT.

475 N.W.2d 899

Filed October 18, 1991. No. 89-377.

1. **Limitations of Actions: Negligence.** In the determination of whether a cause of action is barred by the statute of limitations, the continuous treatment or continuous representation rule is inapplicable where the claimant discovers the alleged negligence prior to the termination of the professional relationship.
2. _____: _____. The discovery exception to the statute of limitations is inapplicable if facts are discovered that constitute the basis of a cause of action within 2 years from the alleged act of negligence.
3. **Trial.** As a matter of law, when reasonable persons can reach only one conclusion, questions of fact which would normally be submitted to a jury become questions of law for the court to decide.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Joseph B. Muller, of The Law Offices of Ronald J. Palagi, P.C., for appellant.

Robert M. Slovek, of Sodoro, Daly & Sodoro, for appellee.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

In April and June 1978, plaintiff, Economy Housing Company, Inc., purchased prepainted plywood panels from Continental Forest Products. In the summer of 1979, Economy

discovered that the panels were defective because the paint was peeling. Economy retained defendant, Ronald Rosenberg, at some time prior to April 10, 1981, to represent it in its claim against Continental Forest. After determining that negotiations would be futile, Rosenberg decided it would be necessary to file a lawsuit. Unknown to Economy, Rosenberg did not file.

Economy's representative, G.H. Magruder, had been actively assured by Rosenberg that the lawsuit had indeed been filed and that Rosenberg was taking all the necessary steps in handling the matter. Magruder had become frustrated with Rosenberg's slow pace and, in August 1982, requested that a partner of Rosenberg's, Robert Gibson, take responsibility for the case. In January 1983, Magruder fired Rosenberg and formally terminated Rosenberg's involvement.

In April 1983, Gibson filed a complaint for Economy, but in October, Continental Forest filed a motion for summary judgment, raising the statute of limitations as barring the claim, which motion was sustained in May 1984.

The legal malpractice action currently before us, which alleges Rosenberg's negligence in failing to file suit against Continental Forest prior to the April 28, 1982, deadline, see Neb. U.C.C. § 2-725 (Reissue 1980), was filed October 5, 1984, and an amended and substituted petition was filed November 2. At a trial on the issue of the statute of limitations, the court found that the statute of limitations had run as of April 28, 1984, on Economy's claim of professional negligence against Rosenberg. See Neb. Rev. Stat. § 25-222 (Reissue 1989). Accordingly, the trial court dismissed the matter and overruled appellant's motion for new trial.

The appellant, Economy, assigns as error that the district court erred in its application of the continuous representation rule to determine that the statute of limitations had expired prior to January or February 1985, and in denying appellant's request for a jury trial on the statute of limitations issue.

Appellee, on cross-appeal, submits that the district court erred in its failure to sustain appellee's motion for directed verdict at the close of all the evidence at the statute of limitations trial.

Appellant argues that according to the continuous treatment rule, its cause of action against attorney Rosenberg did not accrue until January 1983, the month in which Economy formally fired Rosenberg, terminating his representation of Economy's claim against Continental Forest. According to this theory, the statute of limitations would not run until January 1985, thereby making the October 1984 filing timely.

We find this argument unpersuasive. We have held that in the determination of whether a cause of action is barred by the statute of limitations, the continuous treatment or continuous representation rule is inapplicable where the claimant discovers the alleged negligence prior to the termination of the professional relationship. See *Kelly Klosure v. Johnson Grant & Co.*, 229 Neb. 369, 427 N.W.2d 44 (1988). Here, as in *Kelly Klosure*, the individuals involved were fully informed and knowledgeable business people. The party claiming to have been wronged, Economy, knew of the alleged negligence of its attorney, Rosenberg, for some time prior to the termination of the professional relationship. Economy may not avail itself of the continuous representation rule, as the tort committed was not continuous nor unlikely to be discovered prior to the termination of the professional relationship. To hold otherwise would merely encourage clients to sit on their hands, with full knowledge of negligence on the part of the professional who is serving them, knowing that the clock would not start to run on their claim until they actually fired the practitioner. Overwhelming evidence exists in the record to support appellee's contention that Economy was apprised of or was put on inquiry of Rosenberg's negligence as early as August 1982, and possibly earlier.

In *Board of Regents v. Lueder Constr. Co.*, 230 Neb. 686, 433 N.W.2d 485 (1988), we stated that the discovery exception to the statute of limitations was inapplicable, as plaintiff discovered facts constituting the basis of its cause of action within 2 years from the alleged act of negligence. We further found that it was not necessary that the plaintiff have knowledge of the exact nature or source of the problem, but only that a problem existed. Magruder alleged that he had visited Rosenberg every other week or as frequently as twice a

week during the 2-year period during which Rosenberg allegedly assured Magruder that he was on top of the case and that the suit would be coming up for trial at any time.

Nothing had transpired to indicate progress was being made on the case over a period of 2 years; Magruder should have been put on notice and, in fact, was. He had become sufficiently suspicious that a problem existed that, although he fired Rosenberg in January 1983, he hired Gibson to handle the case by at least August 1982. Gibson testified that he had confirmed Magruder's suspicions about Rosenberg in August 1982, when he informed Magruder that Rosenberg had not filed any suit.

Economy's discovery of Rosenberg's negligence occurred approximately 4 months after Rosenberg actually failed to timely file suit and 5 months prior to Economy's formal termination of Rosenberg's services. Magruder admitted that his discovery occurred well within the 2-year statute for professional negligence, and Gibson corroborated this, so the statute of limitations is not tolled.

The appellant discovered its attorney's negligence 4 months after the claim accrued in April 1982, yet still failed to file its claim by April 1984. We hold that appellant's claim against Rosenberg is time barred.

We do not address the appellant's error assignment that it was deprived of a jury trial. As a matter of law, when reasonable persons can reach only one conclusion, questions of fact which would normally be submitted to a jury become questions of law for the court to decide. *City of Hazelton v. Daugherty*, 275 N.W.2d 624 (N.D. 1979). Thus, it is unnecessary to decide the issue. In view of our disposition of this case, it is also unnecessary to address appellee's cross-appeal.

The judgment below is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

ROBERT F. CRAIG, TRUSTEE OF CASSIDY LAND & CATTLE COMPANY, INC., APPELLEE AND CROSS-APPELLANT, V. FARMERS MUTUAL INSURANCE COMPANY OF NEBRASKA, APPELLANT AND CROSS-APPELLEE.

476 N.W.2d 529

Filed October 18, 1991. No. 89-384.

1. **Assignments: Intent.** The intention of an assignor must be to transfer a present interest in a debt or fund or subject matter; if this is clearly expressed, the transaction is an assignment, otherwise not.
2. **Appeal and Error.** In an action at law the factual findings of the trial court in a jury-waived case have the effect of a jury verdict and will not be set aside unless clearly wrong.
3. **Insurance: Breach of Contract: Claims: Proof.** When asserting breach of an insurance contract, the plaintiff has the burden of bringing his claim within the limitations of the policy.
4. **Words and Phrases.** Malicious mischief and vandalism describe wanton or reckless acts intended to destroy or damage property.
5. **Attorney Fees.** In determining the value of legal services rendered by an attorney, it is proper to consider the amount involved in the controversy, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised and the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services.
6. **Prejudgment Interest: Claims.** When reasonable controversy exists concerning the claimant's right to recover or the amount of such recovery, the claim is unliquidated, and prejudgment interest is not allowed.

Appeal from the District Court for Garfield County: RONALD D. OLBERDING, Judge. Affirmed.

Jeffrey H. Jacobsen and Daniel L. Lindstrom, of Jacobsen, Orr, Nelson, Wright, Harder & Lindstrom, P.C., for appellant.

David D. Begley, of Kennedy, Holland, DeLacy & Svoboda, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

Plaintiff-appellee, Robert F. Craig, as trustee in bankruptcy of Cassidy Land & Cattle Company, Inc., brought this action against Farmers Mutual Insurance Company of Nebraska,

defendant-appellant, on an insurance policy issued by Farmers Mutual to Craig as trustee. The policy provided property damage coverage for certain ranchhouses and other buildings located on a ranch which was a part of the assets owned by the bankrupt Cassidy Land company. In his second amended petition, Craig sought recovery under the policy of $83,583.06 for "buildings and structures on the said real estate [which] were damaged or destroyed by vandalism and malicious mischief." Just before the trial to the court began, Craig, with the approval of the court, reduced his damage prayer to $29,414.28.

Farmers Mutual in its answer admitted that "certain structures . . . were damaged by vandalism," but specifically alleged that

> some of the damage claimed . . . was due to theft which is not covered under the policy issued . . . and . . . that some of the damage . . . was not covered under defendant's policy for the reason that the policy . . . does not extend broad form coverage to all of the structures claimed . . . to have been damaged.

After trial to the court, the court rendered judgment for Craig in the amount of $21,724 plus an attorney fee of $15,000 and costs. Farmers Mutual timely appealed to this court, assigning seven errors, which as argued may be consolidated as alleging that the trial court erred (1) in determining that Craig was the real party in interest; (2) in finding that Craig met his burden of proving the amount of the loss, the loss occurred during the time the policy was in force, and the loss was covered by the policy; (3) in awarding excessive damages; and (4) in awarding excessive attorney fees. Craig has cross-appealed, assigning as error the trial court's actions (1) in granting Farmers Mutual's motion for partial summary judgment in finding, as a matter of law, that the policy did not provide broad form coverage for structures other than two houses and (2) in failing to award prejudgment interest to Craig. We affirm.

With regard to Farmers Mutual's first assignment of error, the record shows that Craig, in his capacity as trustee in bankruptcy, was found to have title to the ranch in question in

late 1986, after a quiet title action in Garfield County, Nebraska. On February 13, 1987, Farmers Mutual issued a "Farm Term" policy to Craig, covering the ranch.

Damage occurred to the ranch buildings before the sheriff evicted the ranch residents on May 28, 1987. On August 13, 1987, Craig, as seller, and Big B, Inc., a Nebraska corporation, executed an "Agreement For Sale and Purchase . . ." for the ranch. Paragraph 21 of the agreement provided:

> Seller [Craig] shall assign to Buyer [Big B, Inc.] all right, title and interest of Seller to any insurance proceeds for damage in regard to any claims prior to the date of this Agreement . . . and for damage in regard to any claim subsequent to the date of this Agreement . . . provided, however, that Buyer shall use any insurance proceeds to repair or improve the property.

Farmers Mutual asserts that this language was an effective assignment of Craig's entire interest in the insurance contract and he therefore lacks standing to bring this suit as the real party in interest, citing Neb. Rev. Stat. §§ 25-301 and 25-302 (Reissue 1989). Farmers Mutual argues that Big B, Inc., as the assignee of a chose in action, "is the proper and only party who can maintain suit thereon." Brief for appellant at 37.

Craig contends that the language of the sale agreement indicates an agreement for future assignment of interest in the proceeds of an insurance policy. The court below found that the insurance proceeds for damages were assigned, but that the cause of action for the proceeds and attorney fees was not. In *Tilden v. Beckmann*, 203 Neb. 293, 300, 278 N.W.2d 581, 586 (1979), this court held that "the intention of the assignor must be to transfer a present interest in the debt or fund or subject matter; if this is clearly expressed, the transaction is an assignment; otherwise not." In this case, the evidence shows that Craig had no intent to transfer a present interest in the policy, but, rather, that he agreed to transfer the proceeds, if any, of the policy when those proceeds were obtained.

The language of paragraph 21 of the sales agreement, and the document as a whole, leads to the conclusion that the intent of the parties to the agreement was that an assignment of the proceeds was to be made upon conclusion of whatever legal

action was necessary to collect those proceeds. The provision that "Seller shall assign to Buyer all right, title and interest of Seller to any insurance proceeds for damage," when considered as part of the entire document, reflects an agreement to assign in the future. This approach made it possible to close on the sale before resolution of this action. This provision, then, is not an assignment of policy rights but, rather, an agreement to assign proceeds of the policy. The provision does not operate to divest Craig of the capacity to bring this action. Farmers Mutual's assignment of error in this regard is without merit.

Farmers Mutual's second assignment of error may be separated into three subissues: Craig failed to meet his burden of proving (1) that the loss occurred during the effective dates of the policy, (2) that the policy covers the claimed loss, and (3) the amount of the claimed loss that is payable under the policy.

In an action at law the factual findings of the trial court in a jury-waived case have the effect of a jury verdict and will not be set aside unless clearly wrong. *Brown v. Clayton Brokerage Co.*, 238 Neb. 646, 472 N.W.2d 381 (1991); *Waite v. A. S. Battiato Co.*, 238 Neb. 151, 469 N.W.2d 766 (1991). On review of such a case, we do not reweigh the evidence but, instead, consider the judgment in the light most favorable to the prevailing party. *Id.*

Circumstantial evidence, however, is not sufficient to sustain a finding depending solely thereon for support, unless the circumstances proved by the evidence are of such nature and so related to each other that the conclusion reached by the court is the only one that can fairly and reasonably be drawn therefrom. *Ditloff v. State Farm Fire & Cas. Co.*, 225 Neb. 375, 406 N.W.2d 101 (1987).

The evidence at trial showed that a brick house was damaged sometime after the effective date of the Farmers Mutual insurance policy, February 13, 1987. On February 2, 1987, Sheriff Studnicka served the residents of the ranch with a 3-day notice to quit the premises. At that time he saw nothing out of the ordinary. On May 28, 1987, the sheriff returned to the ranch to serve a writ of assistance, which commanded him to remove all occupants of the premises. He saw a different situation, a house which was an empty shell. Farmers Mutual contends that

it is plausible to conclude that at some time between February 2 and February 13, 1987, the residents of the Cassidy ranch, or others, ransacked the ranchhouse and removed furnishings (including major appliances, a commode, sinks, and a well pump) and that Cassidy family members continued to live in this brick skeleton of a house for another 3 months, without official complaint. This contention is not plausible.

Further, Shirley Lowery, who lived near the ranch in question, testified that she and her husband had made a written offer to Craig sometime in April 1987 to purchase the ranch. On May 23, 1987, the Lowerys received in the mail an invitation to "Cassidy's Eviction," to be held on May 24 at the ranchhouse, "Given by Lowery's [sic]." The invitation was unsigned, and the envelope showed no return address. On May 24, the couple drove past the ranch and saw a truck backed up to the brick house. Further, Sheriff Studnicka testified that his office received no reports of vandalism from any resident of the ranch at any time before May 28, 1987.

Though the evidence supporting the finding of the trial court is circumstantial, the fair and reasonable inference to be drawn therefrom is that this damage occurred after the effective date of the policy. Farmers Mutual's assignment of error in this regard is without merit.

Next, Farmers Mutual contends that Craig failed to prove that the loss was covered by the policy. The policy, in this regard, states that it insures against: "9. Vandalism and Malicious Mischief. This peril does not include loss: . . . (b) by pilferage, theft, burglary, or larceny, but we shall be liable for damage to the building covered caused by burglary." Farmers Mutual contends that the majority of the damages sought by Craig are for items which were stolen and are therefore not covered by the policy. It is important to note that in its pleadings and evidence at the trial, Farmers Mutual admits that some vandalism occurred, but questions the amount of that vandalism.

When asserting breach of an insurance contract, the plaintiff has the burden of bringing his claim within the limitations of the policy. *Ditloff v. State Farm Fire & Cas. Co., supra.* Craig must, therefore, prove both that the loss was the result of

vandalism and that it was accompanied by intent and malice.

In *Swedberg v. Battle Creek Mut. Ins. Co.*, 218 Neb. 447, 356 N.W.2d 456 (1984), we discussed the nature of vandalism and malicious mischief, as well as a party's burden of proving it. "Malicious mischief" and "vandalism" describe wanton or reckless acts intended to destroy or damage the property. A party must prove by a preponderance of the evidence, direct or circumstantial, that the damage was caused by acts intended to damage the property.

To bring his claim within the policy limitations, Craig contends that items removed from the premises, such as curtain rods, sinks, kitchen cabinets, etc., were taken only in furtherance of, and incidental to, the violence wrought upon the property. Farmers Mutual contends that the items were taken in order to appropriate the items for the wrongful personal use of the thief. The question is whether the items were removed with the intent to convert or to use such items inconsistent with the owner's rights, or whether the acts against these houses may more appropriately be characterized as willful destruction of property because of actual ill will or resentment.

Testimony at trial described threatening phone calls made to the Lowerys. Mrs. Lowery stated she became aware of an attitude change on the part of the Cassidys toward her and her husband. The Lowerys received threatening phone calls after they showed an interest in buying the ranch.

Craig himself was threatened. Craig testified that a few days after he was appointed, he introduced himself to one of the Cassidys and was told that he, Cassidy, did not need a trustee. During the course of his trusteeship he was threatened "to be punched in the nose [and] put under the sod." Craig was told by the Cassidys that "we are going to get even with you." He was sued by the Cassidys for $100 million.

Further evidence was adduced showing that after receiving title to the ranch, Craig contacted an insurance broker, and they discussed reinsuring the property. Rather than inspecting the premises to value the ranch, the broker had an employee go there and sketch a plot layout from the road. When asked why he did not go to the ranch, the broker testified that he feared he would be shot. The broker had been the Cassidys' insurance

agent for 17 years.

As for the brick house itself, carpeting was torn up in several rooms and was left where it was or discarded in the front yard of the house. Light fixtures were removed from the ceilings of several rooms, some without measures to cover the ends of the wires. Large holes were found in the walls of several rooms, caused by pulling curtain rods out of the wall. Suspended ceilings had various degrees of damage done to them. Hanging cabinets, as well as an entire 8- to 10-foot floor-mounted "island of some kind," had been removed from the kitchen. A carpenter testified these hanging cabinets appeared to have been removed with a hammer and a crowbar or at times by punching a hole through the Sheetrock walls. A stool, a lavatory, shower doors, and a medicine cabinet had been removed from one of the brick house's bathrooms.

Photographs and trial testimony support the finding by the trial court that a motive of malice was present on the part of those who performed the acts against this property. The contention of Farmers Mutual that the policy did not cover the claimed loss is without merit.

Farmers Mutual then contends that the trial court erred in calculating the amount of damages due Craig under the policy. In part, Farmers Mutual argues, "The testimony reflects that a substantial amount of the loss claimed by Craig is related to items that were replaced merely because they were worn out." Brief for appellant at 35. At trial, Farmers Mutual adduced evidence from its claims adjuster as to labor in the amount of $3,033 "to replace missing items" and evidence of $2,047 of "vandalized items." As stated above, Farmers Mutual recognizes there was some vandalism or malicious mischief, but contends the court erred in determining the amount of those damages.

In this regard, the policy states:

> 2. How Losses Are Settled.
>
> Loss to covered property will be settled at the actual cash value of the damaged property at the time of loss. Actual cash value includes deduction for depreciation.
>
> We will pay no more than the lesser of:
>
> (a) the cost to repair or replace the damaged property

with property of like kind and quality, subject to deduction for depreciation; or

(b) the limits of liability of this policy.

In his amended petition, as filed, Craig sought damages of $83,583.06 as his loss under the policy. Just before the trial began, Craig amended his prayer to $29,414.28. Lengthy testimony from workmen, together with many invoices in great detail, was submitted to support the amount of damages claimed.

In *Ohnstad v. Omaha Public Sch. Dist. No. 1*, 232 Neb. 788, 442 N.W.2d 859 (1989), we repeated the rule that in a law action tried to the bench, the court is the sole judge of questions of fact and is the judge of the credibility of the witnesses. A determination by the trial court will not be reversed absent a showing of an abuse of discretion. In this case, nearly $84,000 was spent to refurbish the ranch property. At trial the trial court determined that the amount necessary to repair the vandalized items was $21,724.

The trial court carefully considered what invoices constituted the repair of damages caused by vandalism and what labor and material invoices constituted improvements to the premises beyond the condition the premises were in before the vandalism occurred. In so doing the trial court found that the award "to repair the vandalism" was $21,724, and rendered judgment in favor of plaintiff for that amount. There is sufficient evidence in the record to support that finding. Farmers Mutual's assignment of error in this regard is without merit.

Farmers Mutual then contends that the trial court's award of attorney fees was both unwarranted and excessive. Neb. Rev. Stat. § 44-359 (Reissue 1988) states, "In all cases when the beneficiary . . . brings an action upon any type of insurance policy . . . the court . . . shall allow the plaintiff a reasonable sum as an attorney's fee . . . ." Obviously, Craig's action in this case was brought upon a type of insurance policy. We have held that "the amount of attorney fees allowed pursuant to Neb. Rev. Stat. § 44-359 . . . rests generally in the . . . discretion of the trial court." *Malerbi v. Central Reserve Life*, 225 Neb. 543, 557, 407 N.W.2d 157, 166 (1987).

Craig's recovery of attorney fees was based upon documentation regarding time spent, air travel expenses incurred, and rates charged by his attorney. Farmers Mutual would have the court limit both the dollar-per-hour rate at which Craig's counsel should bill his time and the recovery amount to a one-third percentage of the actual final recovery. Farmers Mutual argues by implication that Craig could have hired a local attorney of equal competence who charges a lower rate and would not need to spend time and money on air travel. Also, Farmers Mutual asserts, "Any attorney fee recovered in this matter should be limited to not more than one-third of the recovery on the actual claim." Brief for appellant at 39.

In *Ruby Coop. Co. v. Farmers Elevator Mut. Ins. Co.*, 197 Neb. 605, 250 N.W.2d 239 (1977), this court examined a trial court's allowance of attorney fees in the amount of one-third the judgment, based on evidence adduced at a posttrial hearing. The amount awarded was based on evidence that the attorney was handling the case on a contingent fee basis. We stated that a contingent fee involves risks that are not pertinent to a reasonable attorney fee for services rendered and remanded the cause for a determination of a reasonable attorney fee.

We stated:

> "In determining the value of legal services rendered by an attorney, it is proper to consider the amount involved, the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised and the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney, and the customary charges of the bar for similar services. . . ."

Id. at 611, 250 N.W.2d at 243.

In view of the situation faced by Craig and the practical problems inherent in representing the trustee in this case, the trial court did not abuse its discretion in setting the attorney fee in this case. This assignment of error is without merit.

Craig assigns two errors in his cross-appeal: The trial court erred (1) "in granting [Farmers Mutual's] motion for partial summary judgment in finding that, as a matter of law, the insurance policy did not provide broad form coverage for

structures other than house no. 1 and house no. 2" and (2) in failing to award Craig prejudgment interest.

With regard to the first assignment, the policy provides specific "Broad Form" coverage, for a specific premium, for "Dwelling #1" and "Dwelling #2." No broad form coverage is provided for other structures listed in the policy declarations. We agree with Farmers Mutual that there is no ambiguity in the policy and that broad form coverage was provided for the two listed dwellings only. The trial court did not err in granting summary judgment to Farmers Mutual on this issue.

Craig then contends that the trial court erred in not granting him prejudgment interest on the judgment he received. We have held that "[w]hen reasonable controversy exists concerning the claimant's right to recover or the amount of such recovery, the claim is unliquidated, and prejudgment interest is not allowed." *Lutheran Medical Center v. City of Omaha*, 229 Neb. 802, 810, 429 N.W.2d 347, 352 (1988). In this case, while it might be considered that vandalism had indeed occurred, there was a great deal of controversy as to the amount of damages. Just before trial, apparently based on the granting of partial summary judgment, Craig reduced his claim from approximately $84,000 to approximately $29,000. The trial court's judgment was for less than the amended claim. The trial court did not err in refusing to grant prejudgment interest.

In this connection, we note that no reference is made to the provisions of Neb. Rev. Stat. §§ 45-103.02 to 45-103.04 (Reissue 1988). In view of our disposition of the question of prejudgment interest and the posture of the case, we need not discuss those statutes.

The trial court's judgment is affirmed in its entirety. Craig is granted $3,500 to be applied on his attorney fees in this court.

AFFIRMED.

WEST NEBRASKA GENERAL HOSPITAL, A CORPORATION, APPELLEE, V. FARMERS INSURANCE EXCHANGE, APPELLANT.

475 N.W.2d 901

Filed October 18, 1991. No. 89-647.

1. **Summary Judgment.** Summary judgment is proper when the evidence in the record discloses that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** On appeal, this court views the evidence in the light most favorable to the party against whom summary judgment is granted.
3. **Health Care Providers: Liens.** A hospital lien attaches upon admission of the patient to a hospital for treatment.
4. _____: _____. A hospital lien is enforceable against the patient upon attachment, but perfection is required if the hospital seeks to enforce the lien against third parties.
5. **Health Care Providers: Liens: Judgments: Claims: Attorney Fees.** A hospital lien transfers the patient's interest in sums obtained in judgment or settlement of his claims, up to the value of the services provided less a reasonable portion of the costs of recovering that sum, including attorney fees, to the hospital.
6. **Actions: Insurance: Liability: Negligence.** Direct actions against liability insurance carriers based on the negligence of the insured are not permitted in Nebraska.
7. **Health Care Providers: Liens: Judgments: Actions: Parties.** The proper party defendant against whom to assert a hospital lien is generally the party against whom a judgment is obtained or with whom a settlement is reached.
8. **Tort-feasors: Insurance: Claims.** An insurer acts on behalf of the tort-feasor in settling a claim directly with an injured party, and therefore any settlement reached is between the injured party and the tort-feasor, not the injured party and the insurer.
9. **Health Care Providers: Liens: Insurance: Actions: Liability.** When an insurance company impairs a hospital lien by paying the patient directly despite the existence of a perfected lien, the insurance company is liable in a direct action by the hospital.
10. **Health Care Providers: Liens: Notice.** At least substantial compliance with the notice requirements of the hospital lien statute is necessary to perfect such a lien.
11. **Health Care Providers: Liens: Insurance: Notice.** Actual knowledge on the part of an insurance company that a hospital is treating a patient and of the amount of the patient's bills is not sufficient notice to perfect a hospital lien.

Appeal from the District Court for Scotts Bluff County: ALFRED J. KORTUM, Judge. Reversed and remanded with directions.

J.L. Zimmerman and Joy Shiffermiller, of Atkins Ferguson Zimmerman Carney, P.C., for appellant.

John F. Wright, of Wright, Sorensen & Brower, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

This action was brought by plaintiff-appellee, West Nebraska General Hospital (West Nebraska), against defendant-appellant, Farmers Insurance Exchange (Farmers), to enforce a hospital lien. Farmers filed a general demurrer. West Nebraska then filed a motion for summary judgment, which the trial court granted, awarding West Nebraska $26,909.02 plus interest. Farmers appeals.

FACTUAL BACKGROUND

Kenneth Schneider was involved in an automobile-motorcycle accident with Janae Kehm. As a result of the accident Schneider required treatment at West Nebraska. During his approximately 8 weeks of treatment Schneider incurred medical bills of $31,361.07.

The automobile driven by Kehm was covered by a liability insurance policy issued by Farmers. On June 22, 1987, Bobby Willey, a claims representative for Farmers, and Peter Hoagland, the attorney representing Schneider, reached an agreement to settle Schneider's claims for the policy limits of $50,000. The following morning Hoagland picked up the settlement draft from Farmers' offices. At the time this settlement occurred, Willey was aware of Schneider's treatment at West Nebraska and of the full amount of his medical bills.

On June 22, 1987, the same day the settlement was reached, West Nebraska's attorney mailed a letter claiming a lien in the amount of $4,412.05 to Lawrence Lessert, one of Farmers' independent insurance agents. Lessert does not recall the exact date of receipt of this letter, other than that it was "within the next couple days" after its mailing. Confused as to his responsibility regarding the lien, Lessert called Willey, who told him to forward the entire package to Willey's office. Willey does not remember the exact date of the phone call from Lessert. The letter claiming the lien was received by Willey on

July 1.

The full amount claimed in the June 22 lien was paid in early July 1987. Subsequently, on July 16, the hospital sent Farmers a "Supplemental Hospital Lien" claiming the balance due of $26,959.02. It is this supplemental lien which forms the basis for this lawsuit.

ASSIGNMENTS OF ERROR

On appeal Farmers asserts 10 separate assignments of error. Based on the arguments presented in its brief, these combine to assign as error the trial court's overruling the demurrer and the court's granting of West Nebraska's motion for summary judgment. Farmers argues that (1) it is not a proper party defendant in an action to foreclose a hospital lien because it did not cause Schneider's injuries; (2) West Nebraska did not comply with the notice requirements of Neb. Rev. Stat. § 52-401 (Reissue 1988) prior to Farmers' settlement with Schneider, and therefore the trial court erred in finding that the lien attached; and (3) even if the lien attached, West Nebraska could not enforce it due to its failure to satisfy the statute's notice requirements, and the trial court erred in finding either that no such compliance was necessary or that Farmers had sufficient notice of the lien in this case.

STANDARD OF REVIEW

Summary judgment is proper when the evidence in the record discloses that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. On appeal this court views the evidence in the light most favorable to the party against whom the judgment is granted. *Wiles v. Metzger*, 238 Neb. 943, 473 N.W.2d 113 (1991). Here, then, we view the evidence in the light most favorable to Farmers in analyzing its appeal.

THE STATUTE

Interpretation of the Nebraska hospital lien statute, § 52-401, is a matter of first impression in this court. Therefore, it is necessary to fully discuss the statute's general scheme in order to resolve the issues involved in this case.

Attachment of the Lien.

It is first necessary to determine when a hospital lien attaches. The statute states that when a hospital performs services in connection with the treatment of an injury, the hospital "shall have a lien . . . ." § 52-401. Courts interpreting similar statutes with the mandatory language "shall" hold that the lien attaches upon admission of the patient to the hospital for treatment. See, *In re Nelson*, 92 Bankr. 837 (D. Minn. 1988); *Rolla Community Hosp. v. Dunseith Com. N. Home*, 354 N.W.2d 643 (N.D. 1984); *Palm Springs Gen. Hosp. v. State Farm Mut. Auto. I. Co.*, 218 So. 2d 793 (Fla. App. 1969). See, also, *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989) (same for fertilizer liens). We agree.

Holding that the hospital lien attaches when medical services are provided does not render the notice provisions of the statute superfluous. The hospital's lien is enforceable as against *the injured party* upon attachment, regardless of whether the hospital complies with the statute's notice provisions. Perfection, on the other hand, is required if the hospital seeks to enforce the lien against *third parties*, such as the tort-feasor. See *In re Nelson, supra*. Read in this manner, the statutory scheme is similar to the well-known rule that the recording of a deed or mortgage is only relevant as against subsequent purchasers for value, but does not affect the validity of the transaction as between the parties themselves. See, *McKenzie v. Beaumont*, 70 Neb. 179, 97 N.W. 225 (1903); *Staples v. Miller*, 319 N.W.2d 57 (Minn. 1982). Thus, if in this case West Nebraska provided the Kehms written notice that it claimed a lien, and the Kehms subsequently settled with Schneider to the exclusion of West Nebraska, the Kehms would be liable to the hospital for the deficiency. If no such notice was provided, however, and the Kehms reached a good faith settlement with Schneider, the hospital's only remedy would be against Schneider.

Enforcing the Lien.

Having held that a hospital lien attaches upon admission of the patient to the hospital for treatment, we find it necessary to address Farmers' argument that it is not a proper party

defendant in this case.

The Nebraska hospital lien statute provides:

> Whenever any person shall employ a physician, nurse, or hospital to perform professional service or services of any nature, in the treatment of or in connection with an injury, and such injured person shall claim damages from the party causing the injury, such physician, nurse, or hospital, as the case may be, shall have a lien upon any sum awarded the injured person in judgment or obtained by settlement or compromise on the amount due for the reasonable value of services necessarily performed, except that no such lien shall be valid against anyone coming under the Nebraska Workers' Compensation Act. In order to prosecute such lien, it shall be necessary for such physician, nurse, or hospital to serve a written notice upon the person or corporation from whom damages are claimed that such physician, nurse, or hospital claims a lien for such services and stating therein the amount due and the nature of such services, except that whenever an action is pending in court for the recovery of such damages, it shall be sufficient to file the notice of such lien in the pending action.

§ 52-401. The Legislature enacted this statute in 1927. Unfortunately, legislative histories for statutes dating that far back do not exist. However, it is the case that

> [a] lien created by statute is limited in operation and extent by the terms of the statute and can arise and be enforced only in the event and under the facts and conditions provided in the statute. It cannot be extended by the court to cases not within the statute.

County Board of Platte County v. Breese, 171 Neb. 37, 44-45, 105 N.W.2d 478, 482-83 (1960).

Under the statute, when the injured party "claim[s] damages from the party causing the injury," the statute gives the hospital "a lien upon any sum awarded the injured person in judgment or obtained by settlement or compromise on the amount due . . . ." § 52-401. Analyzing a similar hospital lien statute, the bankruptcy court for the district of Maryland described such a lien as transferring the interest of the injured party in the

proceeds of a judgment or settlement to the hospital. *In re Howard*, 43 Bankr. 135 (D. Md. 1983). See, also, *In re Nelson*, 92 Bankr. 837 (D. Minn. 1988) (lien attaches to the patient's preexisting cause of action upon rendition of services by the hospital). When this interpretation is applied to the case at bar, the lien transferred to West Nebraska Schneider's interest in sums obtained in judgment or settlement of his claims, up to the value of the services provided by West Nebraska less a reasonable portion of the costs of recovery, including attorney fees. See *United Services Automobile Assn. v. Hills*, 172 Neb. 128, 109 N.W.2d 174 (1961) (subrogor who accepts proceeds of litigation in which he did not participate must contribute proportional share of expenses, including attorney fees).

Direct actions against liability insurance carriers based on the negligence of the insured are not permitted in Nebraska. *State Auto. & Cas. Underwriters v. Farmers Ins. Exchange*, 204 Neb. 414, 282 N.W.2d 601 (1979). Therefore, Schneider could not sue Farmers directly for his injuries. If the lien statute is interpreted as transferring part of Schneider's interest to West Nebraska, then West Nebraska cannot sue Farmers directly either.

Such an interpretation is consistent with the language of § 52-401 when read as a whole. The first sentence of the statute gives the hospital a lien on any amounts the injured party receives from judgment or settlement of his claims. The second sentence requires the hospital to perfect the lien by giving the tort-feasor notice of its existence prior to any such settlement or judgment. In the context of the attorney lien statute, Neb. Rev. Stat. § 7-108 (Reissue 1987), the purpose of which is very similar to that of the hospital lien statute, this court noted that the notice requirement is designed " 'to prevent a bona fide settlement of the controversy by the litigants and payment by the debtor to the creditor in ignorance of the attorney's rights. . . .' " (Emphasis omitted.) *Kleager v. Schaneman*, 212 Neb. 333, 339, 322 N.W.2d 659, 663 (1982), quoting *Cones v. Brooks*, 60 Neb. 698, 84 N.W. 85 (1900). As noted by the appellant, if the Legislature intended the hospital lien created in the first sentence of § 52-401 to be enforceable against insurance companies, it would have required the hospital to provide them notice as well, as have a number of other states. See, e.g., Colo.

Rev. Stat. Ann. § 38-27-102 (West 1990); D.C. Code Ann. § 38-302 (1990); Ind. Code Ann. § 32-8-26-4(b)(3) (Burns Cum. Supp. 1991); Iowa Code Ann. § 582.2 (West 1950); N.M. Stat. Ann. § 48-8-2(C) (1987); N.D. Cent. Code Ann. §§ 35-18-03 and 35-18-05 (1987).

Moreover, as appellee's attorney stated during oral argument, an insurer acts as the tort-feasor's agent in settling with the injured party. Thus, any "settlement" reached is not between the injured party and the insurer, but between the injured party and the tort-feasor. That the insurer writes the check is the result of an independent contractual arrangement and does not alter this basic structure. Because the hospital lien statute creates a lien against the proceeds of a settlement, regardless of where the tort-feasor gets the money to pay that settlement, the tort-feasor is generally the party against which the hospital must assert its lien. See, *Nationwide Mut. Ins. Co. v. A.H.C.C.C.S.*, 166 Ariz. 514, 803 P.2d 925 (1990) (no direct action against insurance company to enforce hospital lien where statute extends lien only to "claims for damages"); *Booth v. Seaboard Fire & Marine Insurance Company*, 285 F. Supp. 920 (D. Neb. 1968), *rev'd on other grounds* 431 F.2d 212 (8th Cir. 1970) (no direct action against tort-feasor's insurer under subrogation provision of Workers' Compensation Act).

We are careful to point out, however, that insurance companies are not completely shielded from liability under our holding. Upon perfection of a lien by a hospital, a duty arises on the part of the tort-feasor's insurer not to impair the hospital's rights under that lien. If such an insurer settles directly with the injured party despite the existence of a perfected hospital lien, it has breached that duty and is liable directly to the hospital. See *Palm Springs Gen. Hosp. v. State Farm Mut. Auto. I. Co.*, 218 So. 2d 793 (Fla. App. 1969). Thus, had West Nebraska sued the Kehms in this case, and complied with the notice provisions of the statute, it would have had a lien on any amounts paid by or on behalf of the Kehms to the extent of Schneider's unpaid bills. If Farmers desired to settle directly with Schneider it would, as the Kehms' agent, have a duty to satisfy the lien and if it failed to do so would be liable to the hospital.

Thus, the only remaining issue is whether the lien in this case was perfected prior to the settlement. For the reasons set out below, we hold that it was not.

Perfection of the Lien.

The hospital lien statute requires a hospital asserting a lien to "serve a written notice upon the person or corporation from whom damages are claimed . . . except that whenever an action is pending in court for the recovery of such damages, it shall be sufficient to file the notice of such lien in the pending action." § 52-401.

Rolla Community Hosp. v. Dunseith Com. N. Home, 354 N.W.2d 643 (N.D. 1984), is often cited in discussions of the significance of noncompliance with the notice provisions of a hospital lien statute. There, a woman sued a nursing home for injuries allegedly sustained there. The hospital which treated her filed a hospital lien statement and served it on the nursing home and the attorney representing the injured party. The hospital filed its statement more than 30 days after providing services to the woman, however, in contravention of the statute. Subsequently, the woman settled her suit against the nursing home. The hospital then brought suit in federal court against the nursing home's insurance company to enforce its lien. The federal district court certified to the North Dakota Supreme Court the question of whether the hospital's failure to strictly comply with the statute's notice provisions barred its suit. The North Dakota court replied that the suit was not barred, holding that if the insurer had actual notice of the filed lien but nevertheless settled with the injured party, the lien was enforceable.

It is important to note that *Rolla* and other cases holding that actual notice is sufficient to satisfy a hospital lien's notice requirements involve situations wherein the hospital filed some notice of its lien, but that filing did not comply with the statute for technical reasons. See, *S. W. Com. Health Services v. Safeco Ins.*, 108 N.M. 570, 775 P.2d 1287 (1989) (mailing of copy of lien statement to insurer's local office rather than its home office as required by statute); *Illini Hospital v. Bates*, 135 Ill. App. 3d 732, 482 N.E.2d 235 (1985) (notices sent by certified

mail rather than by registered mail as required by statute); *Rolla, supra* (failure to file within 30 days of provision of services as required by statute).

Here, West Nebraska is not asserting such a technical defect, but argues that Farmers' actual knowledge that the hospital was treating Schneider and of the amount of his bills is sufficient notice under the statute. Knowledge that the hospital treated Schneider is different from notice that the hospital is claiming a lien for the amounts owed, however. As several of Farmers' witnesses pointed out, Schneider's rich uncle, his mother, or another insurance company might have paid his hospital bills. Without notice that the hospital is claiming a lien on settlement proceeds to satisfy the injured party's debts, knowledge that such debts exist is not sufficient to satisfy the notice provisions of § 52-401.

Such an analysis is consistent with prior Nebraska cases interpreting lien statutes. See, *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989) (fertilizer lien inapplicable against subsequent lienholders where not filed within 60 days of the last date the product, machinery, or labor is supplied, as required by statute); *County Board of Platte County v. Breese*, 171 Neb. 37, 105 N.W.2d 478 (1960), quoting *United States v. Beaver Run Coal Co.*, 99 F.2d 610 (3d Cir. 1938) (a lien is enforceable only when there has been at least substantial compliance with the statutory requirements).

We therefore hold that at least substantial compliance with the notice requirements of § 52-401 is necessary to perfect a hospital lien. Although we do not decide what may constitute substantial compliance in any given case, it is clear that West Nebraska did not substantially comply with the statute's notice provisions in this case. It *mailed* its notice of intention to claim a lien to Farmers on the day the settlement agreement was reached. This was more than 6 weeks after Schneider's release from the hospital. Prior to the time the settlement agreement was reached, West Nebraska provided no indication whatsoever that it planned to claim a lien. Farmers could have no actual or constructive knowledge of such an intent and is not liable under the hospital lien statute. Therefore, the trial court erred in

granting West Nebraska's motion for summary judgment. We reverse, and remand the cause for the entry of judgment in favor of Farmers.

REVERSED AND REMANDED WITH DIRECTIONS.

CAPORALE, J., not participating.

CRAIG A. KNICKREHM, APPELLANT, V. KARLA R. KNICKREHM, APPELLEE.

475 N.W.2d 908

Filed October 18, 1991. No. 90-986.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Kermit A. Brashear II and Julia L. Gold, of Brashear & Ginn, for appellant.

William G. Dittrick, of Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, for appellee.

HASTINGS, C.J., WHITE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

The father appeals from the judgment of the trial court which, on application of the mother to terminate joint custody previously stipulated to by the parties and approved by the court, awarded sole custody of the parties' minor child to the mother with specific visitation rights to the father.

The ultimate test in determining the appropriateness of an award involving custody of a minor child is reasonableness, as determined by the facts in each case, and the trial court's determination normally will be affirmed in the absence of an abuse of discretion. *Capaldi v. Capaldi*, 235 Neb. 892, 457 N.W.2d 821 (1990).

We have reviewed the record de novo, as we are required to

do, and determine that the trial court did not abuse its discretion. See *Capaldi v. Capaldi, supra.*

AFFIRMED.

BOSLAUGH and CAPORALE, JJ., not participating.

JAMES G. SANDERSON, APPELLEE, V. TERILYN B. SANDERSON, NOW KNOWN AS TERILYN B. HOWARD, APPELLANT.

475 N.W.2d 909

Filed October 18, 1991. No. 90-1229.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Affirmed.

John S. Slowiaczek and Todd M. Starr, of Lieben, Dahlk, Whitted, Houghton, Slowiaczek & Jahn, for appellant.

Donald A. Roberts, of Lustgarten & Roberts, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

After a de novo review of the record, see *Hall v. Hall*, 238 Neb. 686, 472 N.W.2d 217 (1991), in this appeal from an application to change custody, we find that a change of circumstances was established by appellee necessitating a transfer of custody to him. We therefore affirm.

AFFIRMED.

IN RE INTEREST OF B.M., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. L.M., APPELLANT.

475 N.W.2d 909

Filed October 18, 1991. No. 91-009.

1. **Parental Rights.** Where a parent is unable to discharge parental responsibilities because of a mental illness or disorder, such as borderline personality disorder, and where there are reasonable grounds to believe that such condition will continue for a prolonged and indeterminate period, parental rights may be terminated if such action is found to be in the best interests of the child.
2. **Trial: Evidence.** A party claiming the improper admission of evidence must object to the admission of such evidence at the time of trial.
3. **Appeal and Error.** Errors which are assigned but not argued will not be considered by this court.
4. **Parental Rights: Proof.** A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent with the child is an independent reason to justify termination of parental rights.
5. **Parental Rights.** When a parent is unable or unwilling to rehabilitate herself within a reasonable period of time, the best interests of the child require termination of parental rights.

Appeal from the County Court for Buffalo County: ROBERT E. WHEELER, Judge. Affirmed.

Jeffrey M. Wirth, guardian ad litem, and Stephen G. Lowe for appellant.

Donald J.B. Miller, Deputy Buffalo County Attorney, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The mother of a daughter born February 27, 1979, appeals from the order of the county court terminating her parental rights. The father, whose parental rights were terminated by the same order, has not appealed.

> Our review is de novo on the record, and we are required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, we will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.

In re Interest of A.M.Y., F.E.Y., and K.C.Y., 237 Neb. 414, 415, 466 N.W.2d 93, 94 (1991).

The record shows that in early April 1987, the appellant and her husband voluntarily placed their daughter in foster care, after reporting to the Department of Social Services (DSS) that she was uncontrollable. The child was found to have bruises on her arm and back. After she reported that her father beat her, a petition was filed on April 8, 1987, alleging that the child was a minor as described in Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988).

Following a court-ordered psychological evaluation of the child, it was found that she was suffering from severe disturbances in her social-emotional adjustment. The nomadic lifestyle of her parents and the trauma associated with the home environment were the primary causes of the child's problems.

On July 29, 1987, the court found that the child was a child as described in § 43-247(3)(a).

In August 1987, the appellant and her husband left Nebraska and moved to Wyoming with their other two children. While the child's parents were in Wyoming, the only contact they made with her was by telephone, and these conversations disturbed her because of the threats made by her father and the obscene language he used.

In November 1987, the appellant and her husband were reported for child abuse. Due to the child abuse allegations, they began therapy in Pinedale, Wyoming, in December 1987. Dr. Gerald Edmonds completed psychological evaluations on both parents and concluded that they were incapable of performing adequately as parents.

Sometime during the summer of 1988, the appellant and her husband returned to Nebraska. At a review hearing on July 13, 1988, the court ordered that the parents were to obtain counseling and attend parenting classes and that telephone visits with the child were to be monitored so that the parents would not make any threats or use obscene language. Personal visitations were to be strictly supervised by DSS.

In October 1988, the appellant and her husband separated. The appellant remained in Nebraska, and her husband moved to Wyoming with their other two children. These two children

were later placed in foster care in Wyoming, and the father relinquished his parental rights to them.

On January 23, 1989, the child was admitted to Richard Young Hospital in Kearney, Nebraska, for psychiatric treatment. During the course of her hospitalization, she and the appellant were provided with a wide variety of professional services directed at improving their relationship and the child's mental health.

At a review hearing on March 8, 1989, the county court for Morrill County, Nebraska, adopted a reunification plan which had been prepared by DSS.

The appellant and anyone in her home in a potential parental role were ordered to cooperate 100 percent with the therapeutic services designated by DSS, including family sessions at Richard Young Hospital, psychological evaluations, family nights at Richard Young, and any outpatient services thereafter. The appellant and anyone in her home having a potential parental role were ordered to participate 100 percent in a parenting class and cooperate 100 percent in any additional services recommended by DSS. At that time the appellant was living with Neal Anastos.

The appellant was also ordered to participate in visitation with the child as designated by DSS, to demonstrate the ability to provide appropriate housing and support for the child, and to extinguish behavior which could result in the filing of criminal charges. The appellant had recently been convicted on bad-check charges.

On October 30, 1989, a petition to terminate parental rights was filed in Morrill County. Prior to any trial on the merits of that petition, the case was transferred to Buffalo County, Nebraska.

On January 30, 1990, the county court for Buffalo County found that the State must either proceed in Morrill County on its petition for termination of parental rights or dismiss that petition and file an appropriate petition in the Buffalo County Court. Accordingly, the petition to terminate parental rights filed in the county court for Morrill County was dismissed without prejudice on February 21, 1990.

On June 8, 1990, a petition to terminate parental rights was

filed in the county court for Buffalo County. A guardian ad litem was appointed for the appellant, and the matter was tried on November 8 and 9, 1990.

Following that hearing, the father's parental rights were terminated, and the appellant's parental rights were terminated because she had substantially and continuously or repeatedly neglected the child and had refused to give her necessary parental care and protection; because the appellant was unable to discharge parental responsibilities because of mental illness or deficiency, and such condition would continue for a prolonged indeterminate period; and because the appellant had failed to correct the conditions leading to the determination that the child was a person as defined by § 43-247(3)(a).

The appellant has assigned as error the trial court's findings regarding the grounds for termination of her parental rights, the insufficiency of the evidence to show that termination of the appellant's parental rights was in the best interests of the child, and the admission of exhibits and testimony concerning psychological opinions because they were not based on reasonable psychological or psychiatric certainty.

The appellant argues that the trial court erred in finding that she is unable to discharge parental responsibilities due to mental illness or mental deficiency and that her condition will continue for a prolonged indeterminate period of time. The appellant contends that borderline personality disorder is not a mental illness under Neb. Rev. Stat. § 43-292(5) (Reissue 1988), because Dr. Brad Bigelow testified that borderline personality disorder would not be classified as a mental deficiency or mental illness.

In *In re Interest of Fant*, 214 Neb. 692, 335 N.W.2d 314 (1983), the appellant was afflicted with borderline personality disorder, which we characterized as a mental illness or deficiency under the statute.

While Dr. Bigelow testified that borderline personality disorder does not fit his definition of mental illness or mental deficiency, Dr. Jack Matteson, an expert in psychiatry who testified for the State, characterized borderline personality disorder as a mental disorder which is not easily treated. Although Drs. Bigelow and Matteson disagreed on the

classification of borderline personality disorder, both experts agreed that a person suffering from borderline personality disorder is significantly impaired with regard to the ability to function in social situations, including the ability to be a parent.

In his report of January 5, 1988, Dr. Edmonds found that the appellant's thinking is "somewhat confused and bizarre" and concluded that she is incapable of performing adequately as a parent. Dr. Kimberly Harkins-Schuelke, in her February 17, 1989, evaluation, found that the appellant "appears to have a long-standing mixed personality disorder which has significantly interfered with her ability to lead a productive life or parent her children in a responsible, stable manner" and concluded that the appellant suffers from a personality disorder with antisocial, passive-aggressive, and paranoid features.

Dr. Bigelow, in both his first psychological evaluation, of May 15, 1989, and his second psychological evaluation, of August 20, 1990, concluded that the appellant was suffering from a borderline personality disorder with passive-aggressive trends. At trial, Dr. Bigelow testified that the appellant possessed or demonstrated the following characteristics or criteria for the borderline personality disorder diagnosis:

1. A pattern of unstable and intense interpersonal relationships characterized by alternating between extremes of overidealization and devaluation.

2. Impulsiveness in at least two areas that are potentially self-damaging, such as excessive alcohol indulgence at different times and impulsively moving from place to place.

3. Inappropriate intense anger or lack of controlled anger.

4. A marked and persistent identity disturbance manifested by uncertainty in long-term goals or career choices, types of friends desired, and preferred values, and some uncertainty in self and a not clearly defined self-image.

5. Frantic efforts to avoid real or imagined abandonment.

The appellant's inability to develop and maintain a stable home environment, impulsively moving from residence to residence, as well as moving from job to job and from relationship to relationship, demonstrates her borderline personality disorder. The appellant has also demonstrated other characteristics of borderline personality disorder by her angry

outbursts to her caseworkers and her projection of blame onto others for her problems.

The evidence is clear and convincing that the appellant's mental disorder will continue for a prolonged indeterminate period of time. Dr. Bigelow testified that "[p]rognosis for treatment is at best guarded" and that there is a fairly strong likelihood that the appellant's personality disorder will continue. Dr. Matteson testified that

> [b]orderline personality disorder would be a disorder of an individual's interpersonal function which contains a number of longstanding maladaptive traits. They tend to be very fixed traits and not amenable to psycho-therapeutic interventions. . . .
>
> . . . .
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> . . . Sometimes psycho-therapeutic intervention can help people to ameliorate some of the more difficult symptoms but . . . it most likely will remain with an individual.

Dr. Bigelow testified that a personality disorder can significantly impair a person's ability to function in a social or occupational setting, as well as the person's ability to function day to day. In his opinion, the appellant "is well-meaning but also reluctant to take ownership of any parenting negligence of the past as well as being prone to project her problems off onto the system." According to Dr. Bigelow, the appellant "has yet to display the termpermanent [sic] or stability which would allow her to provide a predictable and nurturing environment for children."

Dr. Matteson testified that borderline personality disorder adversely affects an individual's mental and interpersonal functioning in such a way as to make it very difficult for the individual to maintain appropriate relationships and that it can affect parenting skills and capacities as well. Dr. Matteson further testified that the appellant's borderline personality disorder would have a detrimental effect on the child if she were consistently exposed to the appellant.

Where a parent is unable to discharge parental responsibilities because of a mental illness or disorder, such as borderline personality disorder, and where there are reasonable

grounds to believe that such condition will continue for a prolonged and indeterminate period, parental rights may be terminated if such action is found to be in the best interests of the child. See, *In re Interest of V.M.*, 235 Neb. 724, 457 N.W.2d 288 (1990); *In re Interest of Fant*, 214 Neb. 692, 335 N.W.2d 314 (1983).

In this case, the evidence is clear and convincing that the appellant's borderline personality disorder prevents her from performing her parental responsibilities and that the appellant's condition will continue for a prolonged indeterminate period.

The appellant claims the trial court erred in the admission of psychological evidence regarding her borderline personality disorder; however, she does not direct us specifically to what evidence she is referring to in the record. In fact, at no place in the record did the appellant object to any testimony or evidence regarding her personality disorder. A party claiming the improper admission of evidence must object to the admission of such evidence at the time of trial. See *In re Interest of D.L.S.*, 230 Neb. 435, 432 N.W.2d 31 (1988).

In terminating the appellant's parental rights, the trial court found that the appellant had substantially and continuously or repeatedly neglected the child and had refused and failed to give her necessary parental care and protection. The appellant assigns this finding as error, but this assignment is not argued in her brief. Errors which are assigned but not argued will not be considered by this court. *State ex rel. Spire v. Strawberries, Inc.*, *ante* p. 1, 473 N.W.2d 428 (1991).

The appellant argues in her brief that the plan of rehabilitation was not reasonable; however, she did not assign this as error, and there is nothing in the record indicating that the appellant ever objected to the plan. Errors which are argued on appeal but not assigned will also not be considered by this court. *State v. Bonczynski*, 227 Neb. 203, 416 N.W.2d 508 (1987).

The appellant contends that the trial court erred in finding that she had failed to correct the conditions which led to the court's determination that the child was a child as defined by § 43-247(3)(a).

A parent's failure to make reasonable efforts to comply

> with a court-ordered plan of rehabilitation designed to reunite the parent with the child is an independent reason to justify termination of parental rights, and when a parent is unable or unwilling to rehabilitate herself within a reasonable period of time, the best interests of the child require termination of parental rights.

In re Interest of V.M., supra at 727, 457 N.W.2d at 291.

The appellant's nomadic lifestyle had been a concern since the inception of the case. The March 8, 1989, rehabilitation plan ordered the appellant to provide appropriate housing and support for the child.

The record shows that the appellant lived in approximately 10 residences between January 1989 and November 1990. The appellant admitted to a caseworker that there were times when she had no permanent residence.

The appellant had difficulty maintaining employment, not because of a lack of skills, but because of her inability to get along with her employers and coworkers. Because of this, she was unable to demonstrate appropriate support for the child and constantly had to continue to rely on others, including DSS, for her own financial support.

The appellant also failed to participate 100 percent in the therapeutic services designated by DSS. While the appellant initially actively participated in the services offered at Richard Young Hospital during the child's hospitalization, her participation diminished toward the end of the hospitalization. The appellant missed the last four or five family nights, had sporadic attendance at family therapy sessions, and failed to actively participate in family therapy sessions that she attended. The appellant would give different excuses for missing a single session and would be seen about town when she was supposed to be attending therapy.

The appellant did avoid the filing of additional criminal charges against her and did complete a parenting class. However, her significant other, Anastos, did not complete the parenting class nor participate 100 percent in the therapeutic services designated by DSS. The appellant also attended most of her counseling sessions with a Ruth Olsen, but these efforts resulted in no significant progress, and the appellant made no

improvement in dealing with her relationship with the child.

"The fact of participation in certain elements of the court-ordered plan of reunification does not necessarily prevent the court from entering an order of termination where the parent has not made satisfactory progress toward reunification." *In re Interest of A.M.Y., F.E.Y., and K.C.Y.*, 237 Neb. 414, 420-21, 466 N.W.2d 93, 97 (1991). The evidence is clear and convincing that the appellant did not make satisfactory progress toward reunification and that the appellant failed to comply with the court-ordered rehabilitative plan which was designed to correct the conditions which led to the court's jurisdiction over the child.

Furthermore, the evidence is clear and convincing that the child's best interests require that the appellant's parental rights be terminated. Although the child loves the appellant, she recognizes that it is not good for her to live with the appellant. The child has bonded with her foster family and wants to be adopted by them. Her foster family is willing to adopt her and provide the permanence and stability that she needs and which the appellant is unable to provide.

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DIANE K. HARTMANN, ALSO KNOWN AS BRANDI HARTMANN, APPELLANT.

476 N.W.2d 209

Filed October 25, 1991. No. 90-399.

1. **Criminal Law: Constitutional Law: Witnesses.** A criminal defendant states a violation of the confrontation clause of the U.S. Constitution by showing that she or he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to reliability of the witness.
2. _____: _____: _____. A defendant in a criminal trial has a right to cross-examine an opposing witness regarding a pending civil action arising out of the same set of facts.

3. **Criminal Law: Trial: Convictions: Appeal and Error.** Not all errors entitle a criminal defendant to the reversal of an adverse trial result; it is only prejudicial error, that is, an error which cannot be said to have been harmless beyond a reasonable doubt, which requires that a conviction be set aside.
4. **Trial: Testimony: Appeal and Error.** The factors to be considered in determining whether there exists harmless error beyond a reasonable doubt because of the limitation of cross-examination include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.
5. **Sentences: Appeal and Error.** A sentence imposed within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Affirmed.

Kirk E. Naylor, Jr., for appellant.

Don Stenberg, Attorney General, and James H. Spears for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

I. INTRODUCTION

Pursuant to verdict, defendant-appellant, Diane K. Hartmann, also known as Brandi Hartmann, was adjudged guilty of manslaughter, in violation of Neb. Rev. Stat. § 28-305 (Reissue 1989), and sentenced to imprisonment for a period of not less than 5 nor more than 15 years. She assigns as error the district court's (1) limitation of her right to cross-examine one of the plaintiff-appellee State's witnesses and (2) imposition of an allegedly excessive sentence. We affirm.

II. FACTS

Hartmann, who was 30 years old at the time of the event, is a married woman and the mother of two children, a son, who was then 6, and a daughter, then 3. She first babysat the decedent child, Danny Hartshorn, in June 1987 for approximately 6 weeks. During this time, the child, who was then approximately 8 months old, was allegedly struck by Hartmann's son. The injury resulted in a bruise which covered two-thirds of the

child's back. The child's mother, Linda Hartshorn, spoke with Hartmann regarding the matter, but it was concluded that "kids would be kids" and that the injury was the result of an accident. Hartmann's mother-in-law, who resides about "91 steps" from Hartmann, also saw the bruise on the child.

Because Hartmann was having back problems, the mother had another friend, Jackie Robinson, babysit the child. Robinson was pregnant and thus only able to watch the child until the first week of December 1987. Consequently, Hartmann babysat the child again from early December 1987 until the first part of February 1988. During this period, the child developed water blisters on all 10 fingers, but no cause was ever found. The child was again placed with Robinson, where he remained for 2 months. Problems within her family prevented Robinson from babysitting the child any longer, so he was again placed in Hartmann's care in April 1988.

Sometime during that month, the mother, a registered nurse, noticed that the child was hanging awkwardly by one arm while playing on a swing at home. She, however, found nothing unusual. The next day, the child was taken to Hartmann, where, according to her, he acted funny. When his mother took the child home that evening, she noticed him favoring one arm. This time she found a lump on his shoulder, which led to the discovery that he had a broken clavicle. The injury was treated, but the evidence does not reveal how it occurred.

The child was next injured around June 11, 1988. When his mother went to Hartmann's house to pick him up, the child "had a black eye and his nose was all bruised . . . red and swollen and he had a big lip on the opposite side of the eye that was injured." The child's mother testified that Hartmann reported the child had "hit the — They have a patio there . . . he had fallen off the patio and hit the step" when the child followed Hartmann's son out the back door. According to the mother, the child "looked terrible, but [she] got him home and [she] watched him and he — he acted fine, except for the bruises."

In approximately the last week of June, the child again was injured while at Hartmann's home. Hartmann claimed that on this occasion her son had "gotten [the child] down in the grass

or gotten him down outside, when she took [her daughter] to the bathroom." The child had visible scratches on his face, and after his mother undressed him at home, she discovered "a 50 cent size piece bruise over the right groin — or the right small of his back. Then he had about a three inch area of bruising over the spinal column, like kind of in the middle of the back." These bruises were also seen by the child's father.

The child's mother was told by one friend to look for a new babysitter, while several other people told her that such injuries occasionally occur. The child's mother discussed the matter with her husband, who suggested she stop taking the child to Hartmann, but the mother felt she could not just stop taking him there because the Hartmanns were "our friends, you just can't treat people like that." Hartmann thereafter promised not to leave her son alone with the child.

On July 12 and 13, 1988, the child's mother did not work and remained home with the child. Nothing unusual happened to him on these days. She testified that on the day of the fatal injury, July 14, 1988, the child had not appeared ill and had no visible bruises or marks on his body. She further testified that the child would "whine a little bit" on the way to and when dropped off at Hartmann's home.

At 4:10 p.m. on the last-mentioned day, the child's mother received a telephone call from Hartmann. According to the child's mother, Hartmann "said that [the child] was sick. . . . [H]e woke up from his nap and vomited and that he was breathing funny." The mother asked, "[W]ell, do you think I should come? And [Hartmann] said, [Y]es, I think you should." It took the mother approximately 10 minutes to drive to Hartmann's house. According to the mother, when she arrived, Hartmann's son came running out, "hysterical and crying . . . . And he said, [the child is] sick. . . . [H]e won't talk to me, his eyes are jerking." The child's mother also stated that when she arrived, the child was unconscious, his eyes would not respond, nor would he respond to his mother's voice. She further testified:

> I saw my child laying there. Generalized seizures.
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> . . . .
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> . . . He was having tremors of all of his — his arms and

> his legs. They were like fine tremors, they weren't like major tremors.
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> . . . .
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> . . . He was dusky blue. His eyes were jerking toward the right and his head was jerking toward the right. And as I walked in, I thought he was dead.

The child's mother directed Hartmann to call 911 and, over the next few moments, applied cardiopulmonary resuscitation. According to the mother, when she inquired as to her child's condition and behavior that day, Hartmann said she had no idea what happened: "[Hartmann] said he . . . had slept longer than usual," and when she realized he was not waking up at his normal time, she went to check on him and "found him in vomit"; the child had eaten lunch, and Hartmann knew of no injuries that day. However, one of the emergency medical technicians called to the scene reported the mother had told him the child had not had a good day, that he had been listless and tired. The technician assumed that in making that statement, the mother was reporting what Hartmann had told her. The technician also formed the impression that the child had not eaten well at noon, but the mother did not actually say this to him. She reported only that Hartmann had said the child was tired around naptime, that nothing different had happened that day, and that he had not gotten hurt.

Hartmann's son testified that the child seemed no different on the day in question than he had on any other day, that the child sat while the witness had a swimming lesson before lunch, and that the child did not then seem sick or hurt. However, the witness did at one point say that the child had not eaten well at lunch.

Investigator Jack L. Wyant testified that Hartmann told him that on July 14 the child played in the morning and after lunch before taking his nap. He was out of her sight for only short periods of time, and she said nothing about the child being sick or injured, but did report she heard a "hurt-type cry" from the child while she was outside with him and her children putting up a tent. Hartmann later told Wyant that the child had been fussy at lunch, but did eat.

Hartmann also told Wyant that at 2:30 p.m., just prior to

laying the child down for his nap, her children walked over to her mother-in-law's house. However, the mother-in-law testified that the children arrived at 12:30 p.m., a statement corroborated by the testimony of Hartmann's son, and that they left her home at about 4:20 p.m. Thus, there was testimony that for approximately a 3½-hour period, Hartmann was the only one home with the child. The mother-in-law also testified that Hartmann's son returned to her house within 5 minutes of his departure to tell her that the child was ill.

The two emergency medical technicians called to the scene testified that when they arrived, the child was unconscious. He was rushed to the Seward hospital and later taken to Lincoln General Hospital. All attempts to stabilize the child's condition were futile.

The physician who treated the child in Seward testified that he was in "grave distress." The physician treating the child at the Lincoln hospital testified that the child's condition suggested "significant brain injury." An angiogram performed on July 17 revealed that the child was brain dead. As there was no chance of recovery, the ventilator on which he had been placed was then turned off, and the child died several minutes later at the age of 21 months.

The sister-in-law of the child's mother talked with Hartmann while both were at the Lincoln hospital. Hartmann did not tell the sister-in-law that the child had been sick earlier in the day, but told her that when she went in to check on him, he was staring at the ceiling. Hartmann also told the sister-in-law that when she motioned her hands over the child's eyes, they did not respond.

The State called as a witness a pathologist who spends 20 percent of his time in forensic pathology (the study "used to determine the cause and manner of death in cases that involve the coroner system"). This witness had performed three to four head trauma autopsies on children and stated that in his opinion the child's death was caused by

> severe blunt traumatic injury to the back of the head. This resulted in swelling of the brain, the brain was then forced down through the opening in the spinal canal. Which is what happens when the brain can no longer — when it

> swells and it has no where [sic] else to go. It attempts to get out by going out through the spinal canal and that was what caused the death of this child.

The pathologist had no opinion with regard to the manner of death, saying he could not "tell whether it was intentionally or accidentally caused." Therefore, in his mind "the manner of death remains undetermined between homicidal and accidental."

The autopsy performed by the pathologist revealed a bruising on the left cheek and an "area of bruising on the back of the head." Several additional bruises and hemorrhaging were discovered on the underside of the scalp. The pathologist testified that the fatal injury, evidenced by the fracture and large bruise, was caused by a broad, blunt type of object, not a short object or a sharp surface, and was the result of a single event. He also identified two fractures on the skull, a large one that began on the left side and ended on the right and a smaller second fracture. The pathologist did not believe that the bruises were all incurred at the same time, but were all less than a week old from the time of the autopsy.

In the pathologist's view, the "massive injury to [the] head" would have resulted in symptoms within 8 hours. He stated they could have occurred "instantaneously or up to eight hours." According to him, the effect of the injury would be an immediate unconsciousness, or it would get progressively worse, with drowsiness, vomiting, and loss of balance. In his view, once the child went into unconsciousness, the condition was irreversible. In the pathologist's opinion, the autopsy did not negate the possibility that the child's head was in motion and hit a stationary object, but he conceded that because of the brain death, the matter was inconclusive. He estimated that the cheek bruise was 24 hours to 3 days older than the bruise on the back of the head.

In conclusion, the pathologist opined that the injury could not have occurred from a simple fall, but that a child running at a high speed who fell might suffer such injuries. It was his view that in order to cause a multiple-fractured skull and to have caused the child's death, the blunt trauma had to have been of significant force.

The State also called as a witness a neuroforensic pathologist. This witness had significantly more focused experience and training in the area of head trauma than the other pathologist. She frequently lectured on head trauma, specifically in the area of child abuse and blunt trauma deaths. She is one of only five physicians in this country who are board certified in both forensic pathology and neuropathology. While this witness did not view the child's body, she reviewed the hospital records, x rays, photographs, and autopsy report.

The neuroforensic pathologist began her testimony by reviewing several studies which showed that out of over 1,000 cases of accidental head injuries involving children, 4 demonstrated only trivial fractures, and none produced neurological damage or death. This witness had no knowledge of any case wherein a child who had fallen over while standing suffered a fatal head injury. She concluded that children on their own could not develop the velocity and deceleration impact necessary to sustain a fatal head injury. Regarding the subject child's head injury, this witness testified:

> This is a very severe head injury. The amount of force applied here is quite significant. And by that I mean, not just that it broke bone, but that it caused a child to die. And we know in this day and age, that children do not die from trivial injuries, they die from significant injuries.

She was of the opinion that the child suffered "a cranial cerebral trauma, meaning that . . . the skull as well as the brain was injured." She gave the following summary of the child's injuries and the cause of his death:

> [A] tremendous blow was struck in the area where this large area of bruising is to the back of the head, that resulted in the skull fracture and that resulted in acceleration of the child's brain, that then resulted in defuse [sic] axonal injury to the cerebral hemispheres into the brain stem that subsequently caused the child's brain to swell up. Now, brain swelling, which has been discussed here in this case, simply refers to the fact that a child, or anybody that has a brain injury or any kind of problem in the brain, anything you do to the brain, the one response that the brain has is to swell up. And it's a very dangerous

> thing to happen, because it's inside of a bony box and it has no place to go. So in this case, it cut off the circulation so that blood could not flow into the cranial cavity and the brain died and the child became brain dead. But that was after the fact. What started this whole line, the proximate cause of all of this was the force that was applied to the child's head that caused the brain injury itself, that then led to the brain swelling, that then led to the further complications that ensured [sic]. . . . [A]n impact was made to the back of this child's head that initiated a train of events, that once that started, could not be stopped and led to the child's dying.

According to the neuroforensic pathologist, the child's death was the result of a homicide. She stated that after the blow was struck, there was no way the child could have survived. The initial impact would result in immediate death, unconsciousness with no ability to stimulate a response, or neurological damage. This would be manifested by seizures, a stunned appearance, inability to respond normally, vomiting, and a dramatic decline until the person became unconscious. "From that time on [when injury incurred], it would only get deeper and deeper into its level of unconsciousness. By that I mean, whatever its initial level of decreased consciousness would be, it would never come back up again, it would only continue to go down." The symptoms would be immediate; the child would not be able to do anything other than lie in bed and have seizures. She stated that the child showed these conditions.

This witness also noted that the child had retinal hemorrhages in the eyes that were not a result of increased cranial pressure, but "resulted from the forces that were applied to this child's head at the time of impact."

This witness agreed with the other pathologist that the injury was caused by a blunt object such as a floor or wall, but she opined that the injury came about from the child's being thrown. According to the neuroforensic pathologist, this injury could not have been inflicted by a child, such as Hartmann's son, but only by an adult. She further disagreed with the other pathologist regarding the age of the bruises. The neuroforensic pathologist was of the view that the bruises were all of a similar

age, saying,

> I see no significant differences in the age of either of [sic] the bruise to the face or to those any place else on the head. The smaller ones may look a little bit older, but remember they are smaller and the smaller an injury is, the more — the more quickly it resolves.

The neuroforensic pathologist also observed that one fracture was complex in that it extended in several directions, and the other was linear, a single line. The fact that there was a complex fracture suggested to her that the death was not an accident. She noted that studies show that children do not suffer fractures to the back of the head by accident, but do so as the result of abuse. The neuroforensic pathologist testified that in this case there was "a complex fracture, that fracture on the left side of the occipital bone has three components to it." The additional bruises underneath the scalp suggested to her that the child had been abused. She also expressed an opinion about Hartmann's response to the child's injury. She stated that the fact Hartmann did not immediately call 911 when she first discovered the child, but waited until his mother arrived and was told to call, raised "red flags that we look at when there has been abusive injuries."

The neuroforensic pathologist was convinced that no child running and falling could generate enough force to cause injuries similar to those received by the child. She further testified that a child would have to be thrown against an object like a wall. "So we're talking about a very forceful swinging against the wall, where usually the head is actually the area of primary impact, rather than the entire body and the head just being part of it." A gentle push against the wall would not result in massive fractures. The neuroforensic pathologist concluded that the child was injured in such a fashion.

III. ANALYSIS

1. Cross-Examination

The first assignment of error questions the district court's decision to disallow cross-examining of the child's mother regarding her pending civil wrongful death action seeking damages from Hartmann, resulting from the child's injuries

and subsequent death. Hartmann claims the ruling violated her right to confront and cross-examine the mother for bias, motive, prejudice, and interest.

(a) Right to Cross-examine

U.S. Const. amend. VI and Neb. Const. art. I, § 11, guarantee an accused the right to confront witnesses. Implicit in the right of confrontation is the right to cross-examine all witnesses. *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Warford*, 223 Neb. 368, 389 N.W.2d 575 (1986). In holding that the confrontation clause is applicable to the states through U.S. Const. amend. XIV, the U.S. Supreme Court stated that "[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). The High Court has further stated that the "right to confront and to cross-examine witnesses is primarily a functional right that promotes reliability in criminal trials." *Lee v. Illinois*, 476 U.S. 530, 540, 106 S. Ct. 2056, 90 L. Ed. 2d 514 (1986), as cited in *State v. Plant*, 236 Neb. 317, 461 N.W.2d 253 (1990). The right to cross-examine a prosecution witness regarding bias or motive is an important interest.

> A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." . . . We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.

Davis v. Alaska, 415 U.S. 308, 316-17, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), citing 3A J. Wigmore, Evidence in Trials at

Common Law § 940 (J. Chadbourn rev. 1970). In a more recent review of the confrontation clause, the U.S. Supreme Court wrote:

> [A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness."

Delaware v. Van Arsdall, 475 U.S. 673, 680, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986), quoting, in part, *Davis v. Alaska, supra*. "[T]he right to cross-examine includes the opportunity to show that a witness is biased, or that the testimony is exaggerated or unbelievable." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51-52, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). Thus, the denial of a criminal defendant's right to confront her or his accusers, and implicitly the right to cross-examination, see *Davis v. Alaska, supra*, is a violation of the defendant's constitutional rights. *State v. Warford, supra*.

Nebraska has no cases directly addressing the right of a criminal defendant to cross-examine a prosecution witness about a pending civil lawsuit against the defendant. However, several cases are useful in defining this court's approach to similar situations. The defendant in *State v. Rincker*, 228 Neb. 522, 423 N.W.2d 434 (1988), contended that the trial court erred in refusing to allow him to show by cross-examination that a witness for the State was on probation at the time of the crime. This court, in finding no abuse of discretion in the ruling, reasoned that since the witness was no longer on probation at the time of trial, was not an accomplice or suspect, and was not the State's only witness, "it was not error to refuse cross-examination to show that the witness" was biased. *Id.* at 532, 423 N.W.2d at 441. The *Rincker* court relied on *Davis v. Alaska, supra*, wherein the U.S. Supreme Court underscored a defendant's right to expose a witness' motivation for testifying. Although a witness' motivation is important for impeachment purposes, the burden is on the defendant to present evidence showing the source of such bias. Where there is only an

allegation of bias and no supporting evidence, such cross-examination may be prohibited. See, *State v. Harris*, 205 Neb. 844, 290 N.W.2d 645 (1980); *State v. Rice*, 214 Neb. 518, 335 N.W.2d 269 (1983).

Although no criminal cases are available in Nebraska interpreting a defendant's right to cross-examine an adverse witness about a pending lawsuit, several civil cases provide guidance. In *Hegarty v. Campbell Soup Co.*, 214 Neb. 716, 335 N.W.2d 758 (1983), the defendants challenged the district court's decision preventing defendants from cross-examining plaintiff, an employee of Union Pacific Railroad, about $162,500 he would receive from the railroad if he did not recover damages in the action. In reference to the railroad's interest in the litigation, this court said that " ' "[w]hen a party offers a witness, the relations of that witness to the thing in issue and his interest in the result become material as affecting his credibility. It is universally held that these things may be developed on cross-examination." . . .' " *Id.* at 725, 335 N.W.2d at 764. Failure to permit cross-examination constitutes reversible error if the complaining party is prejudiced. See *State v. Matejka*, 186 Neb. 454, 183 N.W.2d 917 (1971).

Additional instruction is found in *Kresha v. Kresha*, 216 Neb. 377, 344 N.W.2d 906 (1984), where we held that one party had the right to cross-examine the other regarding contemporaneous litigation involving the two. The court wrote: "The law is well settled that considerable latitude is allowed in eliciting from a witness, or in attempting to elicit and to establish, bias, hostility, or interest of the witness bearing upon his credibility." *Id.* at 387, 344 N.W.2d at 913.

A survey of other jurisdictions illustrates that a defendant in a criminal trial has a right to cross-examine an opposing witness regarding a pending civil action arising out of the same set of facts. In *Jackson v. State*, 104 Nev. 409, 760 P.2d 131 (1988), Jackson sought to reveal on cross-examination the victim's lawsuit against him. In holding that the trial court abused its discretion in prohibiting such testimony, the Nevada Supreme Court declared that "[c]ounsel must be permitted to elicit any facts which might color the witness's testimony." *Id.* at 412, 760 P.2d at 133. Other states have held similarly. E.g., *Porter v.*

U.S., 561 A.2d 994 (D.C. 1989); *State v. Teeter*, 85 N.C. App. 624, 355 S.E.2d 804 (1987); *State v. Milum*, 197 Conn. 602, 500 A.2d 555 (1985); *State v. McFarlane*, 279 S.C. 327, 306 S.E.2d 611 (1983); *Arnold v. State*, 163 Ga. App. 10, 293 S.E.2d 501 (1982); *State v. Whitman*, 429 A.2d 203 (Me. 1981); *Williams v. City of Tulsa*, 623 P.2d 1037 (Okla. Crim. App. 1981). Several jurisdictions have allowed cross-examination of a witness in connection with the possibility of a civil suit. E.g., *State v. Liuafi*, 1 Haw. App. 625, 623 P.2d 1271 (1981); *State v. Whyde*, 30 Wash. App. 162, 632 P.2d 913 (1981).

In *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986), the defendant attempted to cross-examine a prosecution witness regarding the state's dismissal of a witness' pending public drunkenness charge in order to show bias and motive. The trial court refused any questioning of the dismissal. The U.S. Supreme Court wrote: "By thus cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court's ruling violated respondent's rights secured by the Confrontation Clause." 475 U.S. at 679.

"The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the factfinding process. Cross-examination is 'the principal means by which the believability of a witness and the truth of his testimony are tested.' " *Kentucky v. Stincer*, 482 U.S. 730, 736, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987), quoting in part *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). In this case, evidence of the pending lawsuit was a factor the jury could properly consider in its factfinding process. Thus, the district court's ruling was an abuse of discretion and constitutes error.

(b) Effect of Error

However, not all errors entitle a criminal defendant to the reversal of an adverse trial result. See, *State v. Lee*, 224 Neb. 216, 397 N.W.2d 48 (1986); Neb. Rev. Stat. § 29-2308 (Reissue 1989). It is only prejudicial error, that is, an error which cannot be said to have been harmless beyond a reasonable doubt,

which requires that a conviction be set aside. *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990); *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

In *Harrington v. California*, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969), the U.S. Supreme Court announced that the denial of an opportunity to cross-examine an adverse witness does not result in prejudicial error in every case. This was reaffirmed in *Delaware v. Van Arsdall, supra*, where the High Court stated at 475 U.S. at 684: "[W]e hold that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis."

This court recently, in *State v. Green*, 238 Neb. 492, 471 N.W.2d 413 (1991), reaffirmed that an error in admitting or excluding evidence, whether of a constitutional magnitude or not, is prejudicial unless it can be shown that it is harmless beyond a reasonable doubt. However, "where the evidence is cumulative and there is other competent evidence to support the conviction," the improper admission or exclusion is harmless. *State v. Bradley*, 236 Neb. 371, 396, 461 N.W.2d 524, 542 (1990). In *State v. Green, supra*, a prosecution witness testified that defendant had access to the house and the dresser where drugs were found. On cross-examination, the witness invoked her fifth amendment privilege three times, leading the trial court to advise the jury to disregard all of the witness' testimony. We concluded the defendant's unfettered access to the house, the fact that defendant used the witness' dresser, and defendant's own admission before three police officers that the marijuana was his rendered the trial court's error in striking the witness' testimony harmless, as the ruling "did not materially influence the jury in a verdict adverse to a substantial right of the defendant." *Id.* at 503, 471 N.W.2d at 423. A similar outcome was reached in *State v. Bradley, supra*. In that case, the trial court permitted cross-examination of defendant concerning a visit to the victim's apartment. We rejected defendant's claim that the testimony violated his rights. In finding harmless error beyond a reasonable doubt, we concluded that defendant's testimony was cumulative since a prosecution witness provided "more direct evidence." *Id.* at

397, 461 N.W.2d at 542.

The U.S. Supreme Court, in *Delaware v. Van Arsdall, supra* at 475 U.S. at 684, identified additional factors which may be considered in determining whether there exists harmless error beyond a reasonable doubt:

> These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Several jurisdictions have addressed the matter of cross-examination about pending lawsuits to establish potential bias and motive when the witness was the defendant's victim. *State v. Rammel*, 721 P.2d 498 (Utah 1986), found harmless error in the trial court's refusal to permit the defendant to cross-examine the victim-witness about a pending lawsuit; the court stated that the "jury was well aware of [the witness'] possible motivation for testifying as he did." *Id.* at 500. The mere fact that the witness was injured by the defendant provided sufficient evidence of bias and motive. The motivation was a vindication of the witness' rights; the pending lawsuit was not the sole driving reason influencing the witness' testimony. See, also, *State v. Burris*, 131 Ariz. 563, 643 P.2d 8 (1982).

There can be no question but that the child's mother was an important witness for the prosecution in this case. She offered significant testimony about the child's prior injuries, his condition up to the time he was left with Hartmann on July 14, and his condition when she arrived at Hartmann's house after she was notified that he was sick. The child's mother's testimony accounts for 125 pages of the 833-page bill of exceptions. Except for Hartmann's inability to question the child's mother about the lawsuit, however, Hartmann had an adequate opportunity to cross-examine on all other relevant issues.

Moreover, although not expressly revealed on cross-examination, the bias, motive, prejudice, and interest of the child's mother are readily apparent. The child's death and the

fact that he died as a result of a massive concussion provides an obvious and strong impetus for her testimony. Additionally, Hartmann's mother-in-law expressed to the jury her fear that the child's parents would be bitter over the death of their son. Even if it can be said the mother was not entirely consistent in reporting what Hartmann said concerning the child's condition on the day in question, the inconsistencies are so minor that the absence of cross-examination regarding the mother's pending lawsuit cannot be said to have deprived the jury of the means by which to assess her potential bias.

It was the pathologist and neuroforensic pathologist who shed light on the question of how the child sustained the concussion which caused his death and who explained the development of the symptoms over time. Their cross-examination was not limited in any manner, and Hartmann was able to exhaustively probe their analyses.

In no sense can it be said that the strength of the State's case against Hartmann hinged on hiding the existence of the pending lawsuit. Accordingly, we determine the district court's error in failing to permit Hartmann to cross-examine the mother about her pending lawsuit was harmless beyond a reasonable doubt.

2. Sentence

This brings us to the second and last assignment of error, the claimed excessiveness of the sentence.

It is well settled that a sentence imposed within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion. *State v. Kosmicki*, *post* p. 358, 476 N.W.2d 550 (1991); *State v. Red Kettle*, *post* p. 317, 476 N.W.2d 220 (1991); *State v. Heckman*, *ante* p. 25, 473 N.W.2d 416 (1991).

The crime of which Hartmann was adjudged guilty is a Class III felony. See § 28-305(2). Such an offense is punishable by imprisonment for a period of from 1 to 20 years, a $25,000 fine, or both such imprisonment and fine. Neb. Rev. Stat. § 28-105 (Reissue 1985). At the sentencing hearing the district court was urged not to imprison Hartmann because of her family duties and health problems, which include a recent diagnosis of an undetermined type of multiple sclerosis.

In explaining its sentence the district court observed that incarceration gives public notice that a serious wrongdoing, such as killing a 21-month-old, will result in the imposition of a severe penalty. That is to say, any lesser sentence would depreciate the seriousness of the crime and promote disrespect for the law. We cannot say that the sentence imposed constitutes an abuse of discretion.

IV. CONCLUSION

The district court's error in limiting cross-examination being harmless beyond a reasonable doubt and the sentence imposed not being excessive, the judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BYRON K. RED KETTLE, APPELLANT.

476 N.W.2d 220

Filed October 25, 1991. No. 90-432.

1. **Venue: Appeal and Error.** A motion to change venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed unless there has been an abuse of that discretion.
2. **Venue.** The factors to be evaluated in determining whether a change of venue is required because of pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in selection of the jury, the number of challenges exercised during the voir dire, the severity of the offenses charged, and the size of the area from which the venire is drawn.
3. **Trial: Waiver.** Failure to assert a timely objection at the time of trial constitutes a waiver of the objection.
4. **Appeal and Error: Words and Phrases.** Plain error is error which was not preserved at trial, but is plainly evident from the record, which prejudicially affects a litigant's substantial right and is of such a nature that to leave it uncorrected would cause a miscarriage of justice.
5. **Trial: Judges.** A judge should not initiate, invite, or consider an ex parte communication concerning a pending case.

6. **Convictions: Appeal and Error.** A conviction will not be set aside in the absence of a showing that an error prejudiced the defendant.
7. **Appeal and Error.** A defendant cannot complain of error which he invited the court to commit.
8. **Trial: Due Process.** The general rule is that an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings.
9. **Trial: Evidence: Photographs: Appeal and Error.** Photographs are admissible in evidence if shown to be true and correct representations of the places or subjects they purport to represent at times pertinent to the inquiry. Their admission is largely within the discretion of the trial court, and unless an abuse of discretion is shown, error may not be predicated thereon.
10. **Trial: Courts.** Trial courts should refrain from commenting on evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jury.
11. **Criminal Law: Jurisdiction.** When some requisite elements of a crime are committed outside Nebraska, but an essential element of the crime is committed or occurs in Nebraska, a Nebraska court has subject matter jurisdiction for prosecution of a defendant charged with the crime.
12. **Sexual Assault: Proof.** In a sexual assault case, where resistance would obviously be useless, futile, or foolhardy, it is wholly unrealistic to require affirmative direct demonstration of the utmost physical resistance as proof of the victim's opposition and lack of consent.
13. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal unless there is an abuse of discretion.
14. **Sentences.** It is within the discretion of the district court to direct that sentences imposed for separate crimes be served consecutively.

Appeal from the District Court for Sheridan County: PAUL D. EMPSON, Judge. Affirmed.

James R. Wefso, of Crites, Shaffer, Connealy, Watson & Wefso, for appellant.

Robert M. Spire, Attorney General, Sharon M. Lindgren, and, on brief, Steven J. Moeller for appellee.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

In Sheridan County, Nebraska, defendant Byron K. Red Kettle was charged with the following felonies: count I, first degree sexual assault; count II, operating a motor vehicle to avoid arrest; and count III, receiving or retaining stolen property. After a jury trial, defendant was convicted on all

three counts. It was determined that defendant was not a mentally disordered sex offender, and he was sentenced on count I to "not less than 15 years nor more than 25 years, to be served consecutively with any Federal or South Dakota State sentence now being served," and on counts II and III to 1 to 3 years each, consecutive to count I and concurrent with each other. Defendant timely appealed.

In this court, defendant assigns as error the actions of the trial court in (1) denying defendant's motion for change of venue, (2) talking privately with defendant off the record before the trial, (3) allowing defendant to waive his own presence at trial, (4) allowing a witness to identify defendant without the defendant's being present at trial, (5) participating in questioning of the State's primary witness, (6) allowing into evidence acts of defendant which occurred outside Nebraska, (7) determining that the evidence was sufficient to support convictions on counts I and III, and (8) imposing excessive sentences. We affirm.

In our review we are obligated to view the evidence in the light most favorable to the prevailing party, which in this case is the State. See *State v. Walker*, 225 Neb. 794, 408 N.W.2d 294 (1987). So viewed, the evidence established the following facts: On September 30, 1987, defendant entered a ConoMart convenience store near Box Elder, South Dakota, at approximately 3 a.m. He held a knife to the throat of the victim, who was a clerk at the store; took money from the cash register; and then took the victim with him and drove away in her car. He drove through Pennington County, South Dakota, where, at some point, defendant pulled off the road and told the victim to take her sweater off. She refused, and he grabbed her by the jawbone and squeezed; he then told her if she did not cooperate it would not bother him to kill her. She complied. Defendant then grabbed the front of her bra and tore it in two. No further testimony was received regarding events in South Dakota.

Defendant drove across the Pine Ridge Indian Reservation and headed further south, into Sheridan County, Nebraska, where he eventually stopped at a grove of trees near a country road. At this point, the victim did not know where they were.

Defendant and the victim got out of the car, walked around, and returned to the car. Defendant opened the trunk, took out a mat, and laid it on the ground. He told the victim to take her clothes off, which she did, and defendant had sexual intercourse with her.

At some point later, the victim asked defendant if she could "go to the bathroom." She then ran away to a nearby farmhouse. No one was at the house and the victim entered. She contacted the county sheriff's office by telephone. The sheriff was sent in the general direction of the farm, as determined by the telephone number, since the victim did not know her location. The dispatchers determined the location of the farmhouse and radioed the sheriff, who drove to the farmhouse and picked up the victim. As the sheriff was driving out of the farmyard, defendant drove up in the victim's car. Defendant then drove away at a high rate of speed, pursued by several officers, and was eventually taken into custody in northern Sheridan County after defendant drove through a roadblock and blew out a tire on the car he was driving.

Defendant first contends that the trial court erred in failing to grant his motion for change of venue, filed November 28, 1989. As stated above, the incidents forming the basis for the information occurred on September 30, 1987, and the information was filed on November 6, 1989. Defendant's motion was argued to the court on March 27, 1990. One exhibit was submitted by defendant at this hearing. That exhibit consisted of 12 newspaper articles from the Rapid City (South Dakota) Journal. Two of the articles appeared in the newspaper shortly after the incident, six appeared in October 1987, and four appeared in 1988, with the most recent article appearing in September 1988.

No evidence as to the circulation of the Rapid City Journal in Sheridan County was presented, nor was any evidence presented that any person in Sheridan County read the Rapid City Journal.

The trial court did not rule on the motion immediately, but stated,

> We will wait until jury selection, and see if we can get an impartial jury. If the panel has been tainted by the

> newspaper publicity, or in any other way, then we won't be able to select a fair and impartial jury and the Motion for Change of Venue will be granted.

On April 9, 1990, a jury panel of 27 was passed for cause, after 4 prospective jurors were excused because they stated they had formed an opinion on the case. The trial court permitted individual voir dire of the members of the panel, and a jury was selected. Defendant renewed his motion for change of venue and that motion was denied. The trial was on April 11, 1990, and the guilty verdicts were returned that same day.

The law with regard to changes of venue is well settled. A motion to change venue is addressed to the discretion of the trial judge, whose ruling will not be disturbed unless there has been an abuse of that discretion. *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990); *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987); *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987).

In *Bird Head, supra* at 830-31, 408 N.W.2d at 316, we stated:

> The factors to be evaluated in determining whether a change of venue is required because of pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated throughout the community, the degree to which the publicity circulated in areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in selection of the jury, the number of challenges exercised during the voir dire, the severity of the offenses charged, and the size of the area from which the venire is drawn.

No evidence was presented which indicated the prospective jurors on the panel could not render a verdict based on the evidence presented in court. No evidence was presented as to the degree to which publicity was circulated in Sheridan County. Evidence showed that the last newspaper publicity in the Rapid City Journal was more than 18 months before the trial. That newspaper is published in Rapid City, South Dakota, which is approximately 130 miles from Rushville, Nebraska, where the case was tried.

The trial court scrupulously protected defendant's right to a

fair and impartial jury. The trial court did not err in denying defendant's motion for a change of venue. Defendant's first assignment of error is without merit.

Defendant next contends that his procedural due process rights were violated when just before the trial began, the court, at defendant's request, cleared the courtroom of everyone, including counsel and the court reporter, for a private discussion between defendant and the court. No objection was made by defense counsel as to the actions of the court. "Failure to assert a timely objection at the time of trial constitutes a waiver of the objection." *State v. Keithley*, 227 Neb. 402, 408, 418 N.W.2d 212, 216 (1988).

In this appeal, defendant contends that the court's conduct constituted "plain error" and that this court must review the court's actions under that standard. We have said that plain error is error which was not preserved at trial, but is plainly evident from the record, which prejudicially affects a litigant's substantial right and is of such a nature that to leave it uncorrected would cause a miscarriage of justice. *In re Interest of A.M.H.*, 233 Neb. 610, 447 N.W.2d 40 (1989). We have always reserved the right to note plain error. *State v. Beyer*, 218 Neb. 33, 352 N.W.2d 168 (1984).

We will review the contentions under that approach. The private discussion occurred following an in-court conference with the counsel for both parties and the defendant personally present. The conference occurred after a jury had been selected and just before the opening statements were to be made. The jury was not present. Defendant told the court that he did not "feel comfortable" with attending trial, and the following colloquy took place:

> THE COURT: I don't understand what you mean when you say, that you don't feel comfortable? Is there anything that we can do that would make you feel comfortable? . . .
>
> MR. RED KETTLE: — give me an hour or so, and I could write it down and give it to you, if I speak it out in front of anybody here it could hurt me.
>
> THE COURT: We have got to start the trial here in just a few minutes. Is there something that I, as a Judge, could fix?

. . . .

THE COURT: . . . Is there something that you also don't want [your attorney] to hear and how about this court reporter?

MR. RED KETTLE: Nobody.

THE COURT: Just you and me.

Okay. Sheriff, clear the courtroom, it will be just me and Mr. Red Kettle.

The court and defendant then apparently had a private conversation. The others then returned to the court, and, in the presence of defendant and his counsel, the court stated that the "upshot" of their discussion was that the defendant wanted to make a phone call to legal aid and another to his family to tell them the trial was to start. No objection was made by defendant or his counsel to the court's summary of the conversation.

With that background, defendant now cites *State v. Barker*, 227 Neb. 842, 420 N.W.2d 695 (1988), as holding that a judge should not initiate, invite, or consider an ex parte communication concerning a pending case, and contends that "[t]his conduct by the court amounts to plain error on the record, and constitutes reversible error." Brief for appellant at 10.

It is clear that the court's actions, although apparently taken out of an abundance of concern for the defendant, were unwise, and have resulted in giving defendant, on appeal, another reason for his requested reversal of this case. Nonetheless, the court's actions did not result in any prejudice to defendant and did not constitute plain error. If any person could be heard to complain about the conversation, it would be the county attorney for Sheridan County. The conversation was indeed ex parte, excluding the county attorney but not the defendant, who was a party to the conversation.

Prejudice in this connection is not even alleged. If indeed the court's conduct in this regard constituted error, the error was certainly not prejudicial to defendant and therefore cannot constitute reversible error. As set out in *State v. Boppre*, 234 Neb. 922, 955, 453 N.W.2d 406, 430 (1990), "A conviction will not be set aside in the absence of a showing that an error prejudiced the defendant." Further, error invited by a

defendant, as in this case, is not reversible error. As we said in *State v. Ditter*, 232 Neb. 600, 606, 441 N.W.2d 622, 626 (1989), "This jurisdiction also follows the rule that a defendant cannot complain of error which he invited the court to commit." In this case, defendant specifically asked to speak to the judge privately. He may not now be heard to complain that his request was granted, unless he can show prejudice arising from the conversation. Defendant's assignment of error in this regard is without merit.

Defendant then contends, in his third assignment of error, that the trial court erred when it "allowed the defendant to waive his presence at trial." Immediately before jury selection and again immediately before trial, the court instructed defendant in detail that his presence at trial is a right which enables a defendant to aid his attorney in presenting his defense. The court read to the defendant Neb. Rev. Stat. § 29-2001 (Reissue 1989), which requires a felony defendant's presence at trial.

Defendant states, "The general rule is that an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *State v. Bear Runner*, 198 Neb. 368, 370, 252 N.W.2d 638, 640 (1977). Defendant misses the issue. There can be no doubt that defendant does have the right he asserts in his brief. Section 29-2001 spells that out when it provides, "No person indicted for a felony shall be tried unless personally present during the trial."

The questions presented are whether defendant can waive that right, and, if he can, did he waive it in this case? As to the first, this court said in *Scott v. State*, 113 Neb. 657, 659, 204 N.W. 381 (1925), that under Comp. Stat. § 10129 (1922), which is identical to and the predecessor of § 29-2001, "defendant has a right to be present at all times when any proceeding is taken during the trial . . . unless he has waived such right; and, it being a personal right to the defendant, the waiver thereof, if permitted, must be by him personally, and not by his attorneys."

Other courts have recognized that the right may be waived. In *U.S. v. Fontanez*, 878 F.2d 33, 35 (2d Cir. 1989), the court

stated: "Despite the constitutional and statutory dimensions of a defendant's right to be present [at trial], the right may be waived. *Diaz v. United States*, 223 U.S. 442, 456-58, 32 S.Ct. 250, 254-55, 56 L.Ed. 500 (1912) . . . ." See, also, *Polizzi v. U.S.*, 926 F.2d 1311 (2d Cir. 1991); *United States v. Tortora*, 464 F.2d 1202 (2d Cir. 1972).

If a defendant is to effectively waive his presence at trial, that waiver must be knowing and voluntary. *Polizzi v. U.S., supra.* In the case before us, defendant was in the nearby county jail and specifically refused to come to the trial. His right to be present was carefully explained to him in open court by the trial judge, both before the jury voir dire and just before the trial. His counsel urged him on both occasions to be present.

Just before the trial began, the court advised plaintiff of his right to be present and read to him § 29-2001, which requires defendant's presence at trial. The trial court told defendant:

> I don't want you to be convicted of anything you should not be convicted of. One of the safeguards is, if you come to court you can help in your defense, and you will be more than just an empty seat there, you will be a real person to these jurors.

Defendant responded, "I refuse to come."

The court then told defendant:

> We're going to go ahead and start this trial, and like I told you Monday, anytime you change your mind and want to come over to the trial let the jailer know, and the jailer will telephone the Court, and we will stop the trial immediately and wait for you to come over.

It is clear that defendant knowingly and voluntarily waived his presence at trial. At the request of the county attorney, the court then found that it was in the public interest to proceed in the voluntary absence of defendant. The trial then proceeded.

In these circumstances, the trial court was correct in proceeding as it did. To physically force defendant to attend the trial would just change a recalcitrant defendant to an obstreperous defendant, which would probably have resulted in much more prejudice than any possible arising from his mere absence. The jury was instructed, without objection from defendant, as follows:

> Mr. Red Kettle has an absolute right not to testify. The fact that he did not testify must not be considered by you as an admission of guilt and must not influence your verdict in any way.
>
> Mr. Red Kettle also has a right not to be present at the trial. The fact that he has been voluntarily absent from the trial must not be considered by you as an admission of guilt and must not influence your verdict in any way.

A duly and properly set criminal trial cannot be frustrated by the voluntary acts of the defendant. The trial court did not err in holding the trial in defendant's voluntary absence.

Defendant next contends that the trial court erred when the court allowed the victim to identify defendant, during her testimony, from his photograph. Defendant contends that he must be identified in person. We first note that the problem arises because, as discussed above, defendant had voluntarily waived his presence.

In *State v. Stephenson*, 199 Neb. 362, 364, 258 N.W.2d 824, 826 (1977), we said:

> Photographs are admissible in evidence if shown to be true and correct representations of the places or subjects they purport to represent at times pertinent to the inquiry. Their admission is largely within the discretion of the trial court, and unless an abuse of discretion is shown error may not be predicated thereon.

With regard to the photograph, the sheriff of Sheridan County testified, without objection, "That is Bryon [sic] Red Kettle." The chief of police of Rushville, Nebraska, when handed the photograph, testified, "That is the person I placed under arrest that afternoon." A police officer for the Pine Ridge Police Department who aided in defendant's capture was shown the photograph of defendant and testified, "It is Bryon [sic] Red Kettle." The victim testified that she recognized the photograph as one showing the person who abducted and sexually assaulted her. The trial court did not abuse its discretion in allowing defendant to be identified by the victim from defendant's photograph.

Defendant's next assignment is that the trial court erred "in instructing the county attorney how to question the State's

primary witness . . . ." This assignment is apparently based on actions of the trial court which defense counsel now contends were misconduct.

The problem stems from the following exchange during the trial, after the county attorney asked the victim if she recognized the person depicted in the defendant's photograph discussed above:

> [Defense Counsel]: Objection, lack of foundation.
>
> THE COURT: Sustained. Ask her how she knows.
>
> [Defense Counsel]: Object to the Court's instructing Counsel how to examine the witness.
>
> THE COURT: The objection is overruled. Ma'am, you may answer.

No further objection was made by defendant to the testimony following this exchange. Defendant did not move for a mistrial. We have said that trial courts should refrain from commenting on evidence or making remarks prejudicial to a litigant or calculated to influence the minds of the jury. *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990). The remarks of the trial judge, as set out above, did not go to the merits of the case, but were neutral in nature. There is no showing that the court's action prejudiced or adversely affected any right of defendant. Defendant's assignment of error in this regard is without merit.

Defendant then contends, in his sixth assignment of error, that the trial court erred "in allowing the alleged victim to testify regarding events which did not take place in Nebraska, as a substitute for the lack of evidence of any threats or intimidation by the defendant in Nebraska."

In his argument, defendant admits that there was "evidence of physical force by Red Kettle against [the victim] several hours earlier in South Dakota" and concludes that "[t]here was insufficient evidence to prove beyond a reasonable doubt that the sexual intercourse was done by intimidation, force or threat of force in Nebraska." Brief for appellant at 17.

The argument is specious, even if it is assumed that no force was used in Nebraska. We have said, "When some requisite elements of a crime are committed outside Nebraska, but an essential element of the crime is committed or occurs in

Nebraska, a Nebraska court has subject matter jurisdiction for prosecution of a defendant charged with the crime." *State v. Schaaf*, 234 Neb. 144, 150, 449 N.W.2d 762, 767 (1989). See, also, *State v. Manchester*, 213 Neb. 670, 331 N.W.2d 776 (1983); *State v. Hilpert*, 213 Neb. 564, 330 N.W.2d 729 (1983).

On this issue, there is also sufficient evidence for the jury to determine that defendant used force against the victim from the beginning of his encounter with her until she escaped from defendant after she had been sexually assaulted. Defendant first put a knife to the victim's throat at his initial encounter with her. When she pretended to faint and fell to the floor, the victim testified, defendant "began to pull me by my hair" and "the pain was excruciating." Defendant threatened, at least three times, to kill the victim during the flight from the robbery and threatened to lock her in the trunk of the car. When the sheriff found the victim at the farmhouse after she had been sexually assaulted and had escaped from defendant, the sheriff testified: "She was very hysterical. Her face was — appeared to be chapped from having been crying. She was crying all of the time that I was there. She was very, very upset emotionally." Defendant's contention that the evidence did not show force used in committing his sexual assault on the victim is both legally and factually frivolous. As we have said, "Where resistance would obviously be useless, futile, or foolhardy, it is wholly unrealistic to require affirmative direct demonstration of the utmost physical resistance as proof of the female's opposition and lack of consent." *State v. Campbell*, 190 Neb. 22, 25, 206 N.W.2d 53, 56 (1973). Defendant's assignment of error in this regard is without merit.

Defendant then argues that the evidence was insufficient, overall, to support defendant's conviction of first degree sexual assault because there was no corroboration of the victim's testimony. As to this issue, defendant says only, "Under the 1989 statute which removed the requirement of corroboration, the risk of a defendant being tried and convicted on fabricated testimony is greatly increased." Brief for appellant at 17. No further points are raised. Neb. Rev. Stat. § 29-2028 (Reissue 1989) provides: "The testimony of a person who is a victim of a sexual assault as defined in sections 28-319 to 28-320.01 shall

not require corroboration." In the state of the record before us, we determine that defendant's assignment of error in this regard is without merit.

Defendant next contends that "[t]he evidence was insufficient to support a conviction for Receiving Stolen Property." Defendant was charged in count III with receiving or retaining stolen property, in violation of Neb. Rev. Stat. § 28-517 (Reissue 1989). That section provides, in pertinent part, that "[a] person commits theft if he receives, retains, or disposes of stolen movable property of another knowing that it has been stolen . . . ."

Defendant contends that defendant's conduct "may amount to auto theft in South Dakota, but it is not receiving stolen property under the intent of the Nebraska statute." Brief for appellant at 20.

The evidence clearly shows that defendant stole the victim's car in South Dakota. At that point, defendant had not violated any Nebraska statute. When defendant drove that stolen vehicle into Nebraska, however, he violated § 28-517.

Neb. Rev. Stat. § 29-1307 (Reissue 1989) provides: "Whenever any person shall be liable to prosecution as the receiver of any personal property that shall have been feloniously stolen, taken or embezzled, he may be indicted in any county where he received or had such property, notwithstanding the theft was committed in another county."

Clearly, the evidence shows that defendant "received or had" stolen property in Sheridan County. Defendant's assignment of error is without merit.

Finally, defendant contends the sentences imposed on him were excessive and were an abuse of the trial court's discretion. Sexual assault in the first degree, as charged against defendant in count I, is a Class II felony, with a possible sentence of 1 to 50 years' imprisonment. Operating a motor vehicle to avoid arrest, in violation of Neb. Rev. Stat. § 28-319 (Reissue 1989), is a Class IV felony, with a possible penalty of 0 to 5 years' imprisonment, plus a possible fine. Receiving stolen property is a violation of § 28-517, and when the stolen property is of the value of more than $1,000, it is a Class III felony, with a possible penalty of 1 to 20 years' imprisonment, plus a possible fine. The

victim testified her stolen car had a value of $2,700.

As set out above, defendant was sentenced to 15 to 25 years' imprisonment for first degree sexual assault, to be served consecutively to any sentence received in the federal or South Dakota state courts. Defendant was also sentenced to 1 to 3 years' imprisonment for operating a motor vehicle to avoid arrest and to 1 to 3 years for receiving stolen property. The latter two sentences were to be served concurrently with each other and consecutively to the sexual assault sentence.

The law in this area is clear. A sentence imposed within the statutory limits will not be disturbed on appeal unless there is an abuse of discretion. *State v. Tweedy*, 224 Neb. 715, 400 N.W.2d 865 (1987); *State v. Gonzales*, 224 Neb. 659, 399 N.W.2d 832 (1987). Moreover, it is within the discretion of the district court to direct that sentences imposed for separate crimes be served consecutively. *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986); *State v. Tweedy*, 196 Neb. 246, 242 N.W.2d 626 (1976). An abuse of discretion takes place where the trial court's reasons or rulings were clearly untenable and unfairly deprive a litigant of a substantial right and a just result. *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986).

In this case, each of the sentences is well within the statutory limits. Insofar as the sentences were ordered to be served consecutively to the federal and South Dakota sentences, defendant contends that the "maximum sentence" had been imposed by the federal and South Dakota state courts. Defendant would have the State of Nebraska ignore the fact that defendant violated Nebraska law, in addition to his violations of federal and South Dakota law.

Defendant has cruelly assaulted an innocent woman within Nebraska. The trial court did not abuse its discretion in imposing a consecutive sentence for that specific act. In a similar manner, the other two sentences are within the court's discretion. The trial court did not err in imposing the sentences it did.

There was no error committed by the trial court. The judgment and sentences are affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. ANDREW J. HIRD, APPELLANT.

476 N.W.2d 229

Filed October 25, 1991. No. 90-537.

1. **Verdicts: Appeal and Error.** When the evidence is insufficient as a matter of law to support a verdict of guilty beyond a reasonable doubt, such a verdict in a criminal case must be set aside.
2. _____: _____. A guilty verdict in a criminal case will not be set aside for insufficiency of the evidence if there is relevant evidence in the record to support the verdict.
3. **Minors: Statutes.** The contributing to the delinquency of a child statute, Neb. Rev. Stat. § 28-709 (Reissue 1989), does not impose a duty in every case to immediately contact the parents or the authorities upon coming into contact with a runaway.
4. _____: _____. The act of affording shelter to a runaway is not in every case a violation of the contributing to the delinquency of a child statute, especially when the person affording shelter does not induce or encourage the child to leave home initially.
5. **Sentences: Probation and Parole: Appeal and Error.** The denial of probation and the imposition of a sentence of incarceration within statutorily prescribed limits will not be disturbed on appeal unless there is an abuse of discretion.
6. **Sentences.** The imposition of sentence following conviction of crime is not akin to a contract negotiation in which the court offers terms which the defendant is free to accept or reject.
7. **Sentences: Probation and Parole.** A sentencing judge may take a defendant's presentence statements into account in deciding whether to impose a sentence of probation.
8. _____: _____. A trial court does not abuse its discretion in rejecting the alternative of probation and imposing a sentence of imprisonment where the defendant indicates he will not comply with the terms of a proposed order of probation provided by the trial court.

Appeal from the District Court for Lancaster County, BERNARD J. MCGINN, Judge, on appeal thereto from the County Court for Lancaster County, JANICE L. GRADWOHL, Judge. Judgment of District Court affirmed in part, and in part reversed and cause remanded with directions.

Dennis R. Keefe, Lancaster County Public Defender, for appellant.

Robert M. Spire, Attorney General, and James A. Elworth for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

This is a criminal case in which the defendant-appellant, Andrew J. Hird, was charged in four separate counts with practicing psychology without a license, in violation of Neb. Rev. Stat. § 71-1,221 (Reissue 1990); contributing to the delinquency of a child, in violation of Neb. Rev. Stat. § 28-709(1) (Reissue 1989); failure to report suspected abuse or neglect, in violation of Neb. Rev. Stat. § 28-711(1) (Reissue 1985); and interfering with custody, in violation of Neb. Rev. Stat. § 28-316(1) (Reissue 1989).

Hird pled no contest to count I, practicing psychology without a license, and not guilty to the remaining three counts. These three counts were tried to a jury in the county court for Lancaster County, Nebraska. The trial judge directed a verdict for Hird on count III, failure to report suspected abuse or neglect, at the close of the State's case in chief. The jury found Hird guilty of count II, contributing to the delinquency of a child, and not guilty of count IV, violation of custody. After a sentencing hearing the trial judge sentenced Hird to 60 days in the county jail on count I and 90 days in the county jail on count II, the sentences to run consecutively.

Hird appealed to the Lancaster County District Court, which affirmed the trial court's decision. He now appeals to this court.

FACTUAL BACKGROUND

The facts upon which the jury found Hird guilty of contributing to the delinquency of a child are as follows:

On March 16, 1988, Billi Ivey, a 16-year-old high school student, left school with her boyfriend, intending to run away from home, possibly to Kentucky. At the boyfriend's suggestion, the two stopped at Hird's Multi-Cultural Center for Youth and Adults, where Hird engaged in counseling a "wholistic therapy," around 6 p.m. that day.

Billi told Hird that she was running away from home and needed some help trying to figure out what to do. After some discussion it was decided that Hird would put Billi up for the night. Shortly thereafter, Billi called her father to tell him she was all right, but that she was not coming home. Her father

apparently hung up the phone on her at that point. Hird was in the room when Ivey made this call.

Hird arranged for Billi to spend the night at the dormitory room of one of his female interns. Prior to Billi's return to the center the next morning, Hird called her home and spoke to Billi's mother. He told Mrs. Ivey that her daughter had contacted him, and he asked whether the Iveys were interested in meeting with their daughter later that afternoon. Hird denied that he knew where Billi was, but assured Mrs. Ivey that he could arrange the meeting. Because she felt it was the only means of talking to her daughter, Mrs. Ivey agreed to the meeting.

Later that morning, Officer Raymond Kansier of the Lincoln Police Department visited Hird at his center and asked him if Billi had contacted him or if he knew of her whereabouts. Hird told Officer Kansier that Billi had contacted him and that he was interested in assisting her with her problems, but that he did not know where she was. Apparently Billi had arrived back at the center at the time of this conversation. Officer Kansier informed Hird that Billi was a runaway and instructed him to contact the authorities if Billi contacted him again. At no point did Hird report his contact with Billi to the police or the Department of Social Services.

Instead, Billi spent the remainder of the morning and early afternoon watching television at the center. At approximately 3 p.m., Billi's parents arrived at the center. Hird met with Billi and her parents for approximately 2 hours. At that point Mr. Ivey took Billi by the arm and said it was time to leave. Billi resisted and an argument ensued. Shortly thereafter, Billi went home with her parents. Billi testified that she decided to willingly go home rather than have the police come and force her to do so.

At the time of trial, Billi was living and attending school at Boys Town pursuant to a prior agreement between her and her parents that she would be sent there if serious problems with her behavior developed.

ASSIGNMENTS OF ERROR

Hird argues on appeal that the district court erred in affirming the judgment of the county court because (1) there is

insufficient evidence as a matter of law to convict him of contributing to the delinquency of a child, (2) the contributing statute is unconstitutionally overbroad as applied in this case, and (3) the sentences imposed are excessive in light of the facts and circumstances of the case.

SUFFICIENCY OF THE EVIDENCE

On a claim of insufficiency of the evidence, this court will not set aside a guilty verdict in a criminal case which is supported by relevant evidence. *State v. West*, 238 Neb. 939, 473 N.W.2d 81 (1991). However, when the evidence is insufficient as a matter of law to support a verdict of guilty beyond a reasonable doubt, this court will not hesitate to set it aside. *Id.*; *Whomble v. State*, 143 Neb. 667, 10 N.W.2d 627 (1943).

Hird mounts a two-pronged attack on the sufficiency of the evidence in this case. First, he argues that proof of criminal intent is an essential element of the crime of contributing to the delinquency of a child and that the State produced no evidence of such intent in this case. Second, Hird argues that, aside from the issue of intent, the evidence in the record is insufficient as a matter of law to support a jury finding that he contributed to the need for special supervision of a child under 18 years of age. Because of our agreement with the latter contention, it is unnecessary to address the issue of whether criminal intent is an essential element of the crime of contributing to the delinquency of a child.

Section 28-709(1) states:

> Any person who, by any act, encourages, causes, or contributes to the delinquency or need for special supervision of a child under eighteen years of age, so that such child becomes, or will tend to become, a delinquent child, or a child in need of special supervision, commits contributing to the delinquency of a child.

The statute defines a "delinquent child" as "any child under the age of eighteen years who has violated any law of the state or any city or village ordinance." § 28-709(2)(a). There is no evidence in the record that during her stay at Hird's center Billi engaged in any unlawful activity or that Hird in any way

encouraged her to do so. Therefore, we turn our attention to the question of whether there is evidence that Hird contributed to Billi's becoming, or tending to become, a child in need of special supervision.

> The statute defines a child in need of special supervision as
>
> any child under the age of eighteen years (i) who, by reason of being wayward or habitually disobedient, is uncontrolled by his parent, guardian, or custodian; (ii) who is habitually truant from school or home; or (iii) who deports himself so as to injure or endanger seriously the morals or health of himself or others.

§ 28-709(2)(b).

Proceeding in reverse order, there is no evidence to suggest that Hird did anything which caused or tended to cause Billi to behave in a manner injurious to the morals of herself or others. Billi did not engage in any unlawful or immoral conduct, nor was she exposed to such conduct on the part of others while at Hird's center. Moreover, by arranging for Billi to stay with one of his female interns, Hird prevented Billi and her boyfriend from spending an unchaperoned night on the streets of Lincoln, a situation much more threatening to their morals and health.

Neither is there any evidence that Hird caused Billi to be *habitually* truant from school or home. Again, precisely the opposite is the case. Prior to contacting him, Billi apparently did not intend to return to school or home. Through his efforts, however, Billi returned to her parents' home only 1 day after she ran away.

The parties agree that it is subpart (i) of § 28-709(2)(b) that is at issue in this case. Pointing to the anxiety which Hird's failure to immediately report Billi's whereabouts caused her parents, the State argues that his acts contributed to her remaining wayward and disobedient several hours longer than necessary. In essence, the State urges us to recognize a duty on the part of persons coming into contact with runaways to immediately notify either the parents or the authorities.

We are reluctant to interpret § 28-709(1) as creating such a duty. During the sentencing hearing in this case, Christina Godfrey, executive director of the Malone Community Center, testified that in 1987 a 13-year-old boy called one of her staff

members and asked if he could come to the staff person's house. The staff person told the boy he could not, and the boy ultimately committed suicide. Godfrey stated that because of Hird's prosecution, human services agencies are unsure what to do in similar situations. She pointed out that immediately calling the authorities erodes the trust crucial to the effectiveness of centers like hers and results in youths simply not approaching them the next time they are in trouble.

Moreover, it is not necessarily clear when a person becomes a "runaway." Are members of the clergy or neighbors to whom a young person turns for help criminally liable if they do not immediately call the police? Recognizing such a duty potentially precludes people from engaging in much socially desirable conduct. Without stating a definite rule applicable to all situations, we do not think the simple act of affording shelter to a youth on the run is always a violation of the statute, especially when the person affording shelter did not induce or encourage the youth to leave home in the first place. Accord *State v. Macri*, 28 Utah 2d 69, 498 P.2d 355 (1972).

We therefore reject the State's invitation to interpret § 28-709(1) as imposing a duty to immediately contact the authorities upon coming into contact with a runaway. In so doing, we note that § 28-711(1) expressly creates a duty to report suspected abuse or neglect of a child to the police or the Department of Social Services. The Legislature has shown that when it wants to create a duty to report, it knows how to do so. We will not presume to supplement that body's policymaking role. See *Bowers v. Maire*, 179 Neb. 239, 137 N.W.2d 796 (1965).

The record in this case shows that Billi Ivey was a runaway when she arrived on Hird's doorstep. She and her boyfriend had no idea where they were going to spend the night and no idea where they would go the next day, except for a vague notion of going to Kentucky. Had Hird left them to fend for themselves that first night, he might well be facing the same charges. Instead, he put Billi up for the night in a safe place and arranged a meeting with her parents the next day. Far from contributing to Billi's waywardness and disobedience, Hird played an active role in preventing its continuation.

Our discussion should not be interpreted as condoning Hird's behavior, however. Neb. Rev. Stat. § 28-907(1) (Reissue 1989) makes it a crime to furnish false information to a police officer to impede the investigation of a criminal matter. The State did not elect to proceed on this theory. However, Hird's statements to Officer Kansier may well have violated this provision. See *State v. Ewing*, 221 Neb. 462, 378 N.W.2d 158 (1985).

Though the jury acquitted Hird of violation of custody, see § 28-316(1), we find morally indefensible his withholding of information regarding Billi's whereabouts to broker a meeting between her and her parents. Such conduct severely encroaches on the parents' right to raise their own child. The crucial point, however, is that while Hird interfered with the Iveys' right to see their child, he in no way interfered with her ability to see them. There is no evidence suggesting that Billi was not at all times perfectly free to leave the center and either return home or continue her flight. As outlined above, Hird in no way put Billi at risk, and in fact his actions helped her avoid a situation posing much greater threats to her morals and health.

Based on all of the above, we conclude that there is insufficient evidence as a matter of law to sustain a jury finding that Hird contributed to the delinquency of a child. His conviction on that charge is therefore reversed and this cause remanded with directions to dismiss count II of the amended complaint. In light of our holding, it is unnecessary to address the constitutionality of § 28-709 as applied in this case.

EXCESSIVENESS OF THE SENTENCES

Hird also argues that the sentences imposed in this case are excessive. The trial judge sentenced Hird to serve a term of 60 days in the county jail for practicing psychology without a license and 90 days in the same facility for contributing to the delinquency of a child, the sentences to run consecutively. In light of our holding above, we need only review the 60-day sentence imposed for practicing psychology without a license.

Hird argues that he should have received a sentence of probation or fines rather than jail time. The crime of practicing psychology without a license is a Class II misdemeanor. § 71-1,221. Conviction of committing a Class II misdemeanor

subjects a person to imprisonment for up to 6 months, a $1,000 fine, or both. Neb. Rev. Stat. § 28-106 (Reissue 1989). The denial of probation and the imposition of a sentence within statutorily prescribed limits will not be disturbed on appeal unless there is an abuse of discretion. *State v. Green*, 238 Neb. 492, 471 N.W.2d 413 (1991).

The trial judge initially proposed a sentence of probation in this case. In response, Hird indicated he would not comply with the terms of the proposed order, specifically objecting to certain provisions placing restrictions on the continued operation of his counseling center.

The imposition of sentence following conviction of crime is not akin to a contract negotiation in which the court offers terms which the defendant is free to accept or reject. See *State v. Lynch*, 223 Neb. 849, 394 N.W.2d 651 (1986). If Hird desired probation in this case but objected to the reasonableness of the terms involved, he could have challenged the reasonableness of the terms on appeal. See Neb. Rev. Stat. § 29-2262(2)(p) (Cum. Supp. 1988). Instead, he indicated that he would not comply with the terms of the trial court's order. It is entirely proper for a judge to reject the alternative of probation based on the defendant's presentence statements. *Lynch, supra*; *State v. Kinney*, 217 Neb. 701, 350 N.W.2d 552 (1984). The trial judge did not abuse her discretion by imposing a sentence of incarceration in this case. We therefore affirm that part of the trial court's order imposing a sentence of 60 days in the county jail on count I of the amended information.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. JACQUAS L. MARTIN, APPELLANT.

476 N.W.2d 536

Filed October 25, 1991. No. 90-557.

1. **Constitutional Law: Juries: Discrimination: Prosecuting Attorneys.** The equal protection clause of the 14th amendment to the U.S. Constitution bars prosecutors from challenging potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.
2. **Juries: Discrimination: Prosecuting Attorneys: Proof.** In order to make a prima facie case of discrimination in the selection of a jury, a criminal defendant must show that (1) she or he is a member of a cognizable racial group, (2) the prosecutor used peremptory challenges to remove members of the defendant's race from the venire, and (3) the facts and other relevant circumstances give rise to an inference that the prosecutor used those challenges to exclude potential jurors because of their race.
3. _____: _____: _____: _____. Once the defendant has made a prima facie case, the burden shifts to the State to provide a neutral explanation for the peremptory challenges as they relate to the particular case to be tried. The explanation need not rise to the level of a challenge for cause, but neither may the prosecutor rebut defendant's prima facie case by stating that potential jurors were struck based on the intuitive judgment that they would be partial to the defendant because of their shared race.
4. **Constitutional Law: Juries: Discrimination: Prosecuting Attorneys.** The trial court need not determine if the prosecutor's explanation for striking a prospective juror is reasonable, but only that it is nondiscriminatory and is constitutionally permissible.
5. **Criminal Law: Verdicts: Appeal and Error.** The Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Don Stenberg, Attorney General, and LeRoy W. Sievers for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

In November 1989, Omaha police officers answered a call regarding four teenagers' being shot during a sorority-sponsored dance at which members of the Blood and Crip gangs were in attendance. The incident arose from a fistfight between a Blood and a Crip on the dance floor. Upon seeing the confrontation, members from both gangs began to participate in the fight. One of the victims saw Jacquas L. Martin, the defendant, with a gun in his hand, and three other witnesses testified that they had seen Martin fire a gun at the dance.

During voir dire at trial, the prosecutor used her peremptory challenges to strike the only two black prospective jurors on the panel. Defendant Martin's attorney moved that the strikes not be allowed. The district court asked the prosecutor to articulate her reasons for striking each black potential juror.

The prosecutor explained her reasoning for the strikes in that one of the potential jurors had worked for 21 years in a lounge or bar in a neighborhood where there is a lot of gang activity, and the other potential juror was a teacher and a minister. The prosecutor further noted that she struck one potential juror whose spouse is or was in the seminary and that she would have struck another on the basis of the juror's being a minister. However, the defense had already struck that individual.

As part of its case, the State presented evidence from an Omaha police sergeant regarding his investigation of the shootings. The court prohibited the defense from cross-examining the sergeant on certain interviews he conducted at the scene. The court ruled that these statements were clearly hearsay, not falling within the excited utterance exception to the hearsay rule.

Martin was found guilty by the jury of assaulting two of the four victims. For one of the shootings, Martin was sentenced to 5 to 10 years' imprisonment for first degree assault (a Class III felony) and to 20 months' to 5 years' imprisonment for use of a firearm to commit a felony (a Class III felony), to be served consecutively to the first degree assault sentence. For the other shooting, Martin was sentenced to 20 months' to 5 years' imprisonment for second degree assault (a Class IV felony) and

to 20 months' to 5 years' imprisonment for use of a firearm to commit a felony, the sentences to be served consecutively to those previously imposed and consecutively to each other, with credit given for 220 days served.

Martin assigns as error that the district court failed to declare a mistrial after the prosecutor struck two black prospective jurors from the panel, denied defendant the opportunity to present evidence of statements made to the sergeant under the excited utterance exception to the hearsay rule, sustained the defendant's convictions when the evidence was insufficient as a matter of law, and imposed excessive sentences.

As to appellant's first assignment of error, we affirm. *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986), bars prosecutors, through application of the equal protection clause of the 14th amendment to the U.S. Constitution, from challenging potential jurors "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." 476 U.S. at 89. In order to make a prima facie case of discrimination in the selection of a jury, a criminal defendant must show that (1) she or he is a member of a cognizable racial group, (2) the prosecutor used peremptory challenges to remove members of the defendant's race from the venire, and (3) the facts and other relevant circumstances give rise to an inference that the prosecutor used those challenges to exclude potential jurors because of their race. *Batson v. Kentucky, supra.*

Once the defendant has made a prima facie case, the burden shifts to the State to provide a neutral explanation for the challenges as they relate to the particular case to be tried. The explanation need not rise to the level of a challenge for cause, but neither may the prosecutor rebut defendant's prima facie case by stating that potential jurors were struck based on the intuitive judgment that they would be partial to the defendant because of their shared race. *Id.*; *State v. Venable*, 233 Neb. 309, 444 N.W.2d 907 (1989).

The prosecutor was able, in this case, to specify that her reasons for striking the black potential jurors were that, due to being a lounge employee and a minister, the two jurors would

tend not to be sympathetic to the State's position.

The prosecutor's basis for her strikes need not even rise to the level of rationality. As we said in *State v. Walton*, 227 Neb. 559, 564, 418 N.W.2d 589, 593 (1988), "[T]he trial court need not determine if the explanation is reasonable, but only that it is nondiscriminatory and is constitutionally permissible." The assignment is without merit.

As to defendant's second assignment of error, we affirm the district court's decision to exclude the statements the sergeant heard at the scene during his investigation as being hearsay and not falling within the excited utterance exception to the hearsay rule, as found in Neb. Rev. Stat. § 27-803(1) (Reissue 1989). The statute provides that "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is not excluded by the hearsay rule, even though the declarant is available as a witness.

Based upon the information presented to the trial court, it made a finding regarding the prospective testimony:

> Well, the statute talks about a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition. I hear no testimony concerning the condition of this declarant being under stress caused by the event or condition. All I have been told is that he was reacting perhaps to a young woman's comments that he should be cooperative. I don't consider that to lay the foundation for the exception to the hearsay utterance, and therefore the State's objection is sustained.

Evidence existed to support the trial court's finding that the statements did not constitute excited utterances, and thus we will not disturb the finding on appeal.

On a claim of insufficiency of the evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990).

Regarding appellant's third and fourth assignments of error, we affirm. Evidence exists in the record that three people saw the defendant fire a gun, one individual saw defendant with a gun in his hand, and the defendant admitted to two individuals that he did the shooting. The evidence is sufficient to sustain the convictions. As to the sentencing, the ranges of punishments that could have been imposed are 1 to 20 years' imprisonment for each Class III felony and 0 to 5 years' imprisonment for the Class IV felony. Given that the penalties 17-year-old Martin received were within the statutory limits, that at least two people were injured by his firing a gun into a crowd, and that the defendant was reluctant to acknowledge his responsibility for the crime, we find no abuse of discretion in the sentencing of the defendant.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JEFFREY R. LOWREY, APPELLANT.

476 N.W.2d 540

Filed October 25, 1991. No. 90-959.

1. **Criminal Law: Appeal and Error.** Factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong.
2. **Trial: Appeal and Error.** In determining the sufficiency of the evidence to support a factual conclusion made by the trial court in a criminal case, this court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. That determination is for the finder of fact, whose finding must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it.
3. **Drunk Driving: Evidence: Proof.** Reasonable proof that an Intoxilyzer machine was accurate and functioning properly is all that is required as foundation evidence.

Appeal from the District Court for Lancaster County, BERNARD J. MCGINN, Judge, on appeal thereto from the County Court for Lancaster County, RICHARD H. WILLIAMS, Judge. Judgment of District Court affirmed.

Vincent M. Powers for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Defendant appeals from an order of the district court which affirmed a judgment of the county court finding defendant guilty of operating a motor vehicle while under the influence of alcoholic liquor and of failure to yield the right-of-way. We affirm.

Errors assigned by the defendant are that (1) the trial court erred in finding that there was sufficient evidence to support a finding of reasonable grounds to believe defendant was operating a motor vehicle while under the influence of alcoholic liquor, and (2) the trial court erred in determining that there was sufficient foundation to allow the introduction of the Intoxilyzer test results at trial.

Factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong. *State v. Grantzinger*, 235 Neb. 974, 458 N.W.2d 461 (1990).

On May 27, 1989, Lowrey caused an accident which occurred in the intersection at 27th Street and Highway 2 in Lincoln. Lowrey was heading east and turned left to go north on 27th Street when he failed to yield the right-of-way to another motorist, who was driving his car westward on Highway 2.

Lincoln police officer Patrick Knopick arrived at the scene of the accident and approached Lowrey, who was standing in the open doorway of his pickup, leaning against the seat. The officer asked the defendant to show his driver's license, registration, and proof of insurance. Lowrey produced a driver's license, but was unable to locate the registration and proof of insurance, which were later found in Lowrey's pickup by the officer.

Knopick noticed that Lowrey was unstable on his feet, had bloodshot, watery eyes, and had the odor of alcoholic beverage

about his person and breath. Officer Knopick then asked Lowrey to step over to his police cruiser. When defendant exited his vehicle, he fell against the pickup's box. Knopick testified that Lowrey told him he would not be able to make it and that Lowrey had to hold onto the officer.

Officer Jeffrey Howard, a "testing officer," was dispatched to the scene to test the defendant. Howard determined that the defendant was not capable of participating in any field sobriety tests. He noticed that Lowrey's speech was slurred, his eyes were watery, and his eyelids were droopy. Furthermore, he observed that defendant had a very red, flushed face; dry, smacking lips; and a staggering walk. When asked to repeat the alphabet, defendant slurred from *a* to *t*, then stopped and became confused. The officer next asked defendant to count backward from 100. Although told by the officer to stop counting at 60, Lowrey continued. Defendant was then administered an Alco-Sensor pretest, which he failed.

Defendant was then arrested for drunk driving and taken to the detoxification center for an Intoxilyzer test. After Lowrey signed the implied consent form, Officer Howard checked the maintenance, repair, and calibration of the Intoxilyzer Model 4011AS machine. Lowrey blew into the mouthpiece attached to the machine, and the Intoxilyzer registered .157 of a gram of alcohol per 210 liters of breath. The officer then advised the defendant of his *Miranda* rights, and Lowrey confessed that he drank three bourbon and water drinks that evening.

Apparently, defendant's first argument is that there was insufficient evidence to support a finding that the officer had reasonable grounds to believe that defendant was under the influence of alcoholic liquor so as to justify him in requiring defendant to submit to a preliminary test of his breath. See Neb. Rev. Stat. § 39-669.08 (Reissue 1988).

In the first place, defendant overlooks the fact that § 39-669.08(3) authorizes an officer to require a driver to submit to a preliminary test of his or her breath "if the officer has reasonable grounds to believe that such person has alcohol in his or her body, has committed a moving traffic violation, or has been involved in a traffic accident." Defendant was guilty of failing to yield the right-of-way and, inasmuch as the

accident caused $9,000 damage to his vehicle, he was certainly involved in a traffic accident.

Be that as it may, the evidence that defendant was under the influence of alcohol was overwhelming. It seems to be the defendant's position that the officer made up his mind immediately upon arriving at the scene that the defendant was intoxicated. This is not true. Officer Knopick was asked by defendant's counsel, "[S]o the two factors upon which you based your opinion that the defendant who had been involved in a serious automobile accident was under the influence of alcohol was [sic] the odor of alcohol and bloodshot, watery eyes alone? Correct?" To this the officer answered, "Correct." However, the decision to run a preliminary breath test was not made until after the defendant's condition seemed to be so hopeless that field sobriety tests could not be administered.

The trial court heard the evidence and made the determination that the officer had reasonable grounds to believe the defendant was intoxicated. In determining the sufficiency of the evidence to support a factual conclusion made by the trial court in a criminal case, this court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. See *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991). That determination is for the finder of fact, whose finding must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support it. *Id.* The testimony of the officers constitutes overwhelming evidence that they had reasonable grounds to believe that Lowrey was under the influence of alcohol before they administered the preliminary breath test and arrested him. There is no merit to defendant's first assignment of error.

Defendant next attacks the accuracy of the Intoxilyzer machine used to test him.

Officer Howard testified that the machine was working properly. He also stated that the machine had been calibrated, noting that fact from the maintenance certificate that was right next to the cabinets and over the machine.

Rex Thompson, executive director of the detoxification center, is responsible for the maintenance and calibration of the

Intoxilyzer machine that was used to test the defendant. Thompson testified that he tests the Intoxilyzer regularly. He performed a "190 day check" before and after the machine was used to test the defendant, that is, 190-day checks on March 24 and August 10, 1989. The 190-day-check sample is used to show that the Intoxilyzer does not deviate more than 10 percent, the maximum deviation allowed. According to Thompson, the Department of Health laboratories provide an unknown solution that the detoxification center runs through the Intoxilyzer. The detoxification center sends the results back to the Department of Health laboratories, which in turn inform the detoxification center whether the test met the standards. Thompson agreed that he had no personal knowledge of whether the Department of Health performed its task accurately.

Thompson also performed a "40 day check," which is a maintenance check, before and after May 27, 1989, the day the machine was used to test Lowrey. The machine worked properly on both days.

Further, Thompson performed a beam attenuator test before and after May 27, 1989, that is, on December 14, 1988, and July 14, 1989. The tests met the required standards. Thompson testified that the beam attenuator uses a breath simulator solution and that the accuracy of the beam attenuator test relies on the accuracy of the solution that is used. Every solution is good for 1 year or 20 uses, whichever comes first. A solution No. 27 or a solution No. 14 was used around May 27, 1989. Those solutions were tested by Ted Koperski of the Department of Health on June 3, 1988, and on May 8, 1989. Thompson had no personal knowledge of whether solutions Nos. 14 and 27 were accurate, and he had to rely on Koperski's tests for the accuracy of the certificates.

Defendant argues insufficient foundation for admission of the results of the Intoxilyzer test because Thompson had no personal knowledge of the accuracy of the solutions used in the tests to check the reliability of the Intoxilyzer. It is defendant's position that without the testimony of Koperski, the State cannot prove that the Intoxilyzer was in operating order and complied with title 177 of the Nebraska Administrative Code,

which was received in evidence.

An appropriate method for testing the breath with an Intoxilyzer is found in attachment 3 to 177 Neb. Admin. Code, ch. 1, § 007.04A3 (1987). Attachment 3 is a checklist form which was used by the law enforcement officer and was introduced into evidence. The officer completed all the steps set forth in that attachment.

Section 007.05D states that only simulator solutions can be used which have been prepared as shown by a certificate of chemical analysis, which certification shall be in the form of attachment 12. Two exhibits were introduced which conform with attachment 12: exhibits 14C and 14H, which are certified and sworn to by Koperski, certify the accuracy and integrity of solutions Nos. 27 and 14 respectively.

It is provided by § 007.06B that "testing devices used for direct breath testing shall have been checked within 190 days prior to an analysis by a person responsible for maintenance and calibration." Exhibits 14D and 14E are sworn certificates of "John Blosser, agency administrator of 177 NAC 1," for the Department of Health laboratories, that the 190-day checks on the particular Intoxilyzer were performed.

In *State v. Kudlacek*, 229 Neb. 297, 426 N.W.2d 289 (1988), this court held that reasonable proof that an Intoxilyzer machine was accurate and functioning properly is all that is required as foundation evidence. This holding was based on an earlier decision, *State v. Snyder*, 184 Neb. 465, 168 N.W.2d 530 (1969), regarding the test of radar equipment. The defendant's position in *Snyder* was that unless there is proof that the speedometers of the patrol cars and the calibrated tuning fork were accurate, there was insufficient proof that the radar equipment was accurate and functioning properly. In other words, the defendant argued that any comparative testing devices used to determine whether the particular radar equipment was accurate and functioning properly must themselves be proved to be accurate and functioning properly. In *Snyder*, this court held that "[s]uch a chain of evidence might have to proceed ad infinitum." *Id.* at 466, 168 N.W.2d at 531.

> Reasonable proof that the particular radar equipment employed on a specific occasion was accurate and

> functioning properly is all that is required. Evidence that radar equipment was tested within a few hours of its use, by means of a calibrated tuning fork, or by a comparison with the speedometer of a motor vehicle driven through the radar field, and was functioning properly, is sufficient evidence of the accuracy of the radar equipment.

Id. at 467, 168 N.W.2d at 532. See, also, *State v. Kincaid*, 235 Neb. 89, 453 N.W.2d 738 (1990).

This court noted in *State v. Chambers*, 233 Neb. 235, 240, 444 N.W.2d 667, 670 (1989), "In *Snyder* and *Kudlacek*, we rejected the argument that for admissibility of information from a primary instrument, the accuracy of the primary instrument, such as a measuring device, must be established by an appropriate testing device which itself has been tested for accuracy . . . ." However, this court added:

> Without some proof of reliability in the device used to test for accuracy in a primary device, a test for accuracy of the primary device is a meaningless exercise. . . . In any event, we hold that to present "reasonable proof" that a stopwatch was operating correctly as an accurate device to measure time, the watch must be tested against a device whose instrumental integrity or reliability has been established either through proof that the testing device's accuracy has been verified through an independent test for accuracy or through proof that the testing device is the type recognized and normally used to verify accuracy in stopwatches.

Chambers, supra at 241, 444 N.W.2d at 671.

The evidence shows that the Intoxilyzer had been calibrated and that Thompson, the person responsible for its maintenance and calibration, tested the Intoxilyzer regularly. He performed the 190-day checks and the 40-day checks before and after the machine was used to test the defendant. The machine checked within the required standards every time. Furthermore, Thompson performed a beam attenuator test on the Intoxilyzer before and after it was used on the defendant. Although the beam attenuator only needs to be checked once a year, the detoxification center performs the tests at a minimum of twice per year. Although Thompson had no personal knowledge of

whether the solutions Nos. 14 and 27 were accurate, there is evidence that the solutions were tested by Koperski of the Department of Health and were found to be within acceptable limits.

In accordance with *Snyder*, *Chambers*, *Kudlacek*, and *Kincaid*, the State met its burden in establishing the solutions' accuracy through independent sources and in showing reasonable proof that the Intoxilyzer was functioning accurately and properly. To require more would be to extend the chain of evidence requirement "ad infinitum."

The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KENT H. PIERSON, JR., APPELLANT.

476 N.W.2d 544

Filed October 25, 1991. No. 90-966.

1. **Constitutional Law: Appeal and Error.** In order for an issue of constitutionality to be considered on appeal, it must have been raised properly in the trial court. If not properly raised, the issue is waived.
2. **Constitutional Law: Statutes: Standing.** In order to have standing to challenge an allegedly vague statute, one must not have engaged in conduct which is clearly proscribed by the statute, and cannot complain of the vagueness of the law as applied to the conduct of others.
3. **Criminal Law: Due Process: Statutes.** Due process of law requires that criminal statutes be clear and definite.
4. **Criminal Law: Statutes.** A crime and its elements must be so clearly expressed in a statute that an ordinary person can intelligently choose in advance what course of conduct he may lawfully pursue.
5. _____: _____. It is not necessary for a penal statute to be written so as to be beyond the mere possibility of more than one construction. Although a penal statute must be strictly construed, it should be given a sensible construction, and general terms should be limited in their construction and application so as to avoid injustice, oppression, or an absurd consequence.
6. **Intent: Circumstantial Evidence: Proof.** The existence of a required intent, knowledge, or other state of mind may be established through circumstantial evidence.

Appeal from the District Court for Douglas County, JAMES M. MURPHY, Judge, on appeal thereto from the County Court for Douglas County, JOHN J. MCGRATH, Judge. Judgment of District Court affirmed.

David S. Perlman for appellant.

Herbert M. Fitle, Omaha City Attorney, and Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

The defendant, Kent H. Pierson, Jr., was convicted in the county court of carrying a concealed weapon, in violation of Omaha Mun. Code, ch. 20, art. VII, § 20-192 (1990). He was sentenced to pay a $50 fine and timely appealed to the district court, where the conviction and sentence were affirmed. The defendant has appealed to this court, contending the district court erred in holding that § 20-192 of the Omaha Municipal Code was not unconstitutionally vague. In the alternative, he contends that the evidence was insufficient to support his conviction.

In order for an issue of constitutionality to be considered on appeal, it must have been raised properly in the trial court. If not properly raised, the issue is waived. *State v. Schreck*, 226 Neb. 172, 409 N.W.2d 624 (1987). The State first claims the defendant did not properly raise the issue of vagueness in the county court.

The record shows that the defendant did not file a demurrer or move to quash the complaint. See, Neb. Rev. Stat. §§ 29-1807, 29-1808, and 29-1810 (Reissue 1989); *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980) (holding that when the alleged defect in an indictment or information is a matter of interpretation of the statute itself, the constitutionality of the statute may be challenged by filing either a motion to quash or a demurrer). During final argument, however, defense counsel referred to alleged difficulties with § 20-192 "which approach[ed] constitutional

magnitude." Counsel then elaborated on the argument that the phrase "likely to cause death or bodily injury" "is rather broad and is rather vague." Apparently, the county court also considered the defendant's brief regarding the alleged unconstitutionality of the ordinance.

We take this opportunity to emphasize that "vagueness" and "overbreadth" are distinct concepts. In *State v. Copple*, 224 Neb. 672, 401 N.W.2d 141 (1987), we observed that a statute may be unconstitutional if it is either vague or overbroad, but an overbroad statute need lack neither clarity nor precision, and a vague statute need not reach constitutionally protected activity. An enactment which is clear and precise and therefore not vague may still be overbroad if it prohibits the exercise of constitutionally protected conduct.

Although it appears that most of the argument to the county court pertained to overbreadth analysis and that the presentation of the issue could have been more concise, we conclude that the issue of vagueness was preserved by the defendant's plea of not guilty, was specifically raised in the trial court, and was not waived by the defendant. The defendant does not contend in this appeal that § 20-192 is overbroad.

Section 20-192 provides: "It shall be unlawful for any person except an authorized law enforcement officer purposely or knowingly to carry a weapon concealed on or about his person." Omaha Mun. Code, ch. 20, art. VII, § 20-191 defines the term "weapon" as "[a] firearm, stun gun or any other instrument the use of which is intended or likely to cause death or bodily injury." In this appeal, the defendant complains that the ordinance is vague because the phrase " 'likely to cause death or bodily injury' could pertain to almost anything." Brief for appellant at 10.

In order to have standing to challenge an allegedly vague statute, one must not have engaged in conduct which is clearly proscribed by the statute, and cannot complain of the vagueness of the law as applied to the conduct of others. *State v. Copple, supra*. See *State v. Schreck, supra*. Concealing some type of knife or sharp instrument on one's person is not specifically proscribed by § 20-192. Therefore, the defendant in this case is entitled to show that the ordinance, as applied to his

particular activity, is vague. See *State v. Copple, supra.*

Due process of law requires that criminal statutes be clear and definite. *State v. Valencia, supra.* A crime must be defined with sufficient definiteness and there must be ascertainable standards of guilt to inform those subject to the statute as to what conduct will render them liable to punishment, and the dividing line between what is lawful and unlawful cannot be left to conjecture. *Id.* A crime and its elements must be so clearly expressed that an ordinary person can intelligently choose in advance what course of conduct he may lawfully pursue. *Id.*; *State v. Copple, supra.*

However, it is not necessary for a penal statute to be written so as to be beyond the mere possibility of more than one construction. Although a penal statute must be strictly construed, it should be given a sensible construction, and general terms should be limited in their construction and application so as to avoid injustice, oppression, or an absurd consequence. *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980). The prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. *Id.*; *State v. Copple, supra.*

The Omaha ordinance in this case is similar to Neb. Rev. Stat. § 28-1202 (Reissue 1989), which provides in part:

> (1) Except as provided in subsection (2) of this section, any person who carries a weapon or weapons concealed on or about his or her person such as a revolver, pistol, bowie knife, dirk or knife with a dirk blade attachment, brass or iron knuckles, *or any other deadly weapon* commits the offense of carrying a concealed weapon.
>
> (2) It shall be an affirmative defense that the defendant was engaged in any lawful business, calling, or employment at the time he or she was carrying any weapon or weapons and the circumstances in which such person was placed at the time were such as to justify a prudent person in carrying the weapon or weapons for the defense of his or her person, property, or family.

(Emphasis supplied.) The term "deadly weapon" is defined in Neb. Rev. Stat. § 28-109 (Reissue 1989) as follows:

> As used in this code, unless the context otherwise requires:
>
> . . . .
>
> (7) Deadly weapon shall mean any firearm, knife, bludgeon, or other device, instrument, material, or substance, whether animate or inanimate, which in the manner it is used or intended to be used is capable of producing death or serious bodily injury.

This court considered a vagueness challenge to § 28-1202 in *State v. Valencia, supra*, where Valencia was charged with violating § 28-1202 after police found a spring-operated switchblade knife in his pants pocket during a pat-down search. Valencia moved to quash the information, contending that § 28-1202 was unconstitutionally vague and overbroad. The district court sustained Valencia's motion to quash, finding that § 28-1202(1) was unconstitutional as applied because the weapon did not fall within the specific types of knives prohibited but instead fell within the category of "any other deadly weapon," which category was unconstitutionally vague and overbroad. The State appealed, contending the district court erred in making this specific finding.

In holding that § 28-1202(1) was not unconstitutionally vague, we first observed that the Legislature had designated certain weapons—revolvers, pistols, bowie knives, dirks or knives with a dirk blade attachment, and brass or iron knuckles—deadly weapons per se and that the manner of the actual or intended use of those weapons was immaterial under § 28-1202. However, regarding the phrase "or any other deadly weapon," we held that

> it is the element of actual or intended use which renders the words "other deadly weapons" sufficiently definite to provide citizens an opportunity to conform their conduct to the statute; and to distinguish between situations involving culpable concealment, and those involving innocent concealment. It is this element of use or intended use of the object which saves the term "deadly weapon" from being vague or overbroad.

State v. Valencia, supra at 724-25, 290 N.W.2d at 184. We determined, however, that the question of whether an object or

weapon not specifically mentioned in the statute was a "deadly weapon" was a question of fact and that the resolution of the question would depend upon the evidence adduced as to the use or intended use of the switchblade knife.

In *State v. Kanger*, 215 Neb. 128, 337 N.W.2d 422 (1983), we applied the analysis set out in *State v. Valencia, supra*, where Kanger, a prison inmate, was convicted of carrying a concealed weapon after a corrections officer, during a pat-down search, found a homemade knife concealed on Kanger's person. The record in that case showed that Kanger did not resist being searched or attempt to reach for the knife during the search. The parties stipulated that if Kanger were to testify on his own behalf, he would testify that the knife was given to him by another inmate because the other inmate feared a shakedown search of his own cellblock; that Kanger kept the knife in his cell, and upon hearing of the search of his own area he decided to hide the knife in his sock with the intention of getting it out of his cell and into the yard, where he could throw it away; and that he had no intention of using the knife as a weapon. Kanger contended on appeal that the trial court erred in finding that the knife concealed on his person was a deadly weapon within the meaning of §§ 28-1202(1) and 28-109(7). We held that

> in the context of a prison environment and the evidence in this case, there can be no serious doubt that a homemade knife of the kind shown by the evidence here was used or intended to be used in a manner which was capable of producing death or serious bodily injury. Any other conclusion would ignore reality. The defendant's own testimony establishes his knowledge that such a weapon was forbidden and that he knew his possession of it could not be innocent.

215 Neb. at 132, 337 N.W.2d at 424.

Most recently, in *State v. Williams*, 218 Neb. 57, 352 N.W.2d 576 (1984), we reaffirmed the rulings in *State v. Valencia*, 205 Neb. 719, 290 N.W.2d 181 (1980), that § 28-1202(1) designated certain enumerated weapons deadly weapons per se, that the carrying of per se deadly weapons concealed on or about the person constituted a crime regardless of the manner of the actual or intended use of the weapon, and that items not

enumerated could be determined to be deadly weapons only if the manner in which they were used, or intended to be used, was capable of producing death or serious bodily injury.

Williams and a codefendant were arrested on suspicion of driving a stolen automobile. While searching the car for contraband, the police discovered a pellet gun, which looked like a .357 Magnum firearm, in the glove compartment and an 8 1/2-inch-long serrated steak knife, with a 4 3/4-inch blade, beneath the driver's seat. Williams was convicted of carrying a concealed weapon in violation of § 28-1202(1) and claimed on appeal that the trial court erred in failing to instruct the jury that the concealment of a weapon may be innocent as opposed to culpable. In response, the State argued that the steak knife and pellet gun were deadly weapons specifically enumerated in § 28-1202. We held that the steak knife and pellet gun were not per se deadly weapons under § 28-1202 and reversed Williams' conviction, stating:

> We refuse to expand the *Valencia* holding or to construe § 28-1202(1) in that fashion. The context of Chapter 28, article 12, requires that the concept of per se deadly weapon be limited to the specific weapons enumerated in § 28-1202(1). To hold otherwise would mean that every citizen carrying a kitchen paring knife with a 4-inch blade in a picnic basket containing other appropriate picnic items would be concealing a per se deadly weapon and would be guilty of a [crime] without being able to explain his innocent intent.

State v. Williams, supra at 60, 352 N.W.2d at 579. We held that under the circumstances presented in *Williams*, the jury should have been instructed that neither the steak knife nor the pellet gun was a per se deadly weapon, that the jury would have to determine whether one or both of the items were "deadly weapons," and that to convict the defendant, the jury must find that he carried a deadly weapon with the intention to use it to produce death or serious bodily injury.

Turning to the language of the ordinance at issue in this case and applying the analysis set forth in *State v. Valencia, supra*, we conclude that § 20-192 of the Omaha Municipal Code is not unconstitutionally vague in light of the definition of "weapon"

found in code § 20-191. Section 20-191, like § 28-1202(1), enumerates certain items—firearms and stun guns—weapons per se, and an ordinary person is put on notice that it is unlawful to conceal these items on or about his person. The phrase "any other instrument the use of which is intended or likely to cause death or bodily injury" is not unconstitutionally vague because an ordinary person could determine with reasonable certainty (1) whether the use of a particular instrument as a weapon is likely to cause death or bodily injury or (2) whether the person intended to use the instrument to cause death or bodily injury. Whether the accused knew that using the particular instrument as a weapon is likely to cause death or bodily injury and whether the accused intended to use the instrument to cause death or bodily injury are fact questions to be resolved by the trier of fact.

Turning to the defendant's contention in this case that the evidence was insufficient to support his conviction, the record shows that on May 8, 1990, two Omaha police officers saw the defendant drive a car over a curb and into a power pole. The officers thought he might be driving while intoxicated, approached to investigate, and asked him to get out of the car. The defendant cooperated and explained that he had been wiping the humidity off his windshield when he crashed into the pole.

During a pat-down search, the officers discovered two knives on the defendant's person. The knives were covered by an unbuttoned vest the defendant was wearing and neither knife was visible until discovered when the defendant raised his arms during the pat-down search. One knife was a fixed-blade knife approximately 7 inches long with a 3 1/2-inch blade. The other knife was a lock-blade folding knife slightly more than 8 inches in overall length, with a pointed blade approximately 3 1/2 inches long. The defendant made no statements concerning the intended use of the two knives, but explained to the officers that a third instrument found on his person was a leatherworking tool.

We have held that the existence of a required intent, knowledge, or other state of mind may be established through circumstantial evidence. *State ex rel. Spire v. Strawberries,*

Inc., 239 Neb. 1, 473 N.W.2d 428 (1991) (defendants' knowledge that video poker machines would be used in the advancement of unlawful gambling activity was established by the machines' placement in bars where they were played by patrons, together with the defendants' knowledge that the machines had no other purpose except as gambling devices); *State v. Jensen*, 238 Neb. 801, 472 N.W.2d 423 (1991); *State v. Lonnecker*, 237 Neb. 207, 465 N.W.2d 737 (1991) (a defendant possesses a controlled substance when he knows of the nature or character of the substance and its presence and has dominion or control over the substance). See *State v. Lixey*, 238 Neb. 540, 471 N.W.2d 444 (1991) (whether one charged with theft intended to permanently deprive the owner of the property is to be inferred from the words and acts of the defendant and from the circumstances surrounding the incident).

In the present case, the appearance and character of the knives and the circumstances under which they were seized tend to establish that the defendant knew that these particular knives, if used as weapons, were likely to cause death or bodily injury. The evidence was sufficient to support the trial court's finding that the knives were weapons under § 20-191.

The judgment of the district court, affirming the judgment of the county court, is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. MARVIN P. KOSMICKI, APPELLANT.

476 N.W.2d 550

Filed October 25, 1991. No. 90-988.

1. **Expert Witnesses.** A witness may render expert testimony if that witness is qualified as an expert by knowledge, training, skill, experience, or education.
2. **Trial: Evidence.** An exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which the testimony was given. It must also be shown to the satisfaction of the trial court that no

substantial change has taken place in the exhibit so as to render it misleading. As long as the article can be identified, it is immaterial in how many or in whose hands it has been.

3. **Directed Verdict.** A defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence waives any error in the ruling on the motion for a directed verdict.
4. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed.

Roger D. Nunnenkamp, Deputy Hall County Public Defender, for appellant.

Mark J. Young, Deputy Hall County Attorney, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Not satisfied with evidentiary rulings of the trial court and the overruling of his motion for a directed verdict at the close of the State's case in chief, and complaining that his sentence is excessive, 27-year-old Marvin P. Kosmicki appeals his jury conviction and sentence for delivering marijuana, a controlled substance.

We affirm the defendant's conviction and the prison sentence of not less than 2 nor more than 3 years imposed upon Kosmicki by the district court for Hall County.

The defendant was arrested for selling marijuana to a Nebraska State Patrol undercover narcotics agent. The agent testified that on July 12, 1989, he was introduced to the defendant at a bar in Grand Island, Nebraska, at which time the defendant agreed to sell the agent one-quarter ounce of marijuana for $35. Upon receiving payment from the agent, Kosmicki left the bar to obtain the marijuana. In the early morning hours of July 13, the defendant met the undercover agent in the bar's parking lot and delivered to him a plastic baggie containing a green leafy substance. This plastic baggie and its contents were received in evidence at trial as exhibit 2,

and the contents were identified as marijuana.

EVIDENTIARY RULINGS

In the defendant's first two assignments of error, he alleges that the district court was incorrect in overruling his objections to testimony identifying the contents of exhibit 2.

Kosmicki objected to the reception in evidence of the undercover agent's opinion that exhibit 2 contained marijuana. Foundationally, the agent testified that, through training and experience, he was familiar with the language of the drug culture. He further testified that he was familiar with the drug business in Grand Island. His training consisted of three courses covering the identification of narcotics and controlled substances, investigative techniques, and specifically the identification of marijuana. In addition, during 2 years as an undercover officer, the agent had made approximately 150 marijuana buys. After the foregoing foundational testimony was received, over the defendant's objection to foundation, competency, and relevancy, the agent was permitted to testify that in his opinion the substance contained in the plastic baggie he received from the defendant was marijuana. Kosmicki claims that exhibit 2 should not have been received in evidence over his objection. On appeal, Kosmicki makes no complaint that the undercover agent did not possess sufficient training and experience to give an opinion as to the contents of exhibit 2. The defendant complains only that there was a lack of foundation for the agent's opinion because the agent did not testify that he had used his training and experience to form his opinion. Kosmicki's complaint is frivolous. The record reveals that when the agent gave his opinion, the following exchange took place on direct examination: "Q. . . . *[B]ased upon your training and experience* . . . do you have an opinion as to whether or not the substance contained in Exhibit 2 is marijuana? A. Yes. . . . It is marijuana." (Emphasis supplied.)

Kosmicki also objected to Deb Campbell, a forensic drug chemist for the Nebraska State Patrol Criminalistics Laboratory, testifying that exhibit 2 contained marijuana. The district court permitted her to testify, over the defendant's objection, that exhibit 2 did contain marijuana. Kosmicki

claims that Campbell lacked sufficient experience, training, and education to form her opinion. The record reveals that Campbell received a bachelor's degree in both biology and medical technology, and that in her capacity as a chemist for the state criminalistics laboratory she had analyzed over 500 samples of suspected marijuana to determine if they did indeed contain marijuana. She had previously testified as an expert in the chemical analysis of controlled substances for the State 9 or 10 times.

Neb. Rev. Stat. § 27-702 (Reissue 1989) provides that a witness may render expert testimony if that witness is qualified as an expert by knowledge, training, skill, experience, or education. Because both the Nebraska State Patrol undercover agent and Campbell qualified as expert witnesses under the statute, defendant's assignments of error involving evidentiary rulings concerning expert testimony are without merit.

In support of his third assignment of error, Kosmicki argues that the State failed to prove a proper chain of custody as a foundation for the admission of exhibit 2 into evidence. Apparently, this argument arises from the testimony of Campbell that a male laboratory chemist had also performed tests on the substance contained in exhibit 2 and that that chemist had been accused of taking marijuana evidence that was about to be destroyed. Campbell also testified that there was no accusation that the other chemist had improperly placed any substance into any evidence bags. There was no testimony that any marijuana was removed by the other chemist from exhibit 2. Nor was there testimony that the other chemist had placed any substance in exhibit 2 that did not belong there.

In *State v. Green*, 238 Neb. 492, 505, 471 N.W.2d 413, 424 (1991), we repeated the principle governing proper foundation for the admission of exhibits:

> "[A]n exhibit is admissible, so far as identity is concerned, when it has been identified as being the same object about which the testimony was given. It must also be shown to the satisfaction of the trial court that no substantial change has taken place in the exhibit so as to render it misleading. As long as the article can be identified, it is immaterial in how many or in whose hands it has been."

The undercover agent testified that exhibit 2 was placed in a locked, sealed envelope on July 13 and hand delivered by him to the Nebraska State Patrol Criminalistics Laboratory on July 25, still in its sealed condition. The agent testified that the contents of exhibit 2 at trial were in substantially the same condition as they were on the date he had "last examined" them. The agent testified that before he sealed exhibit 2 a field test revealed that the contents of the baggie he received from the defendant were marijuana. The record indicates that the undercover agent "last examined" the contents of exhibit 2 before it was sealed and sent to the state laboratory.

There was no error by the trial court in admitting exhibit 2 into evidence.

MOTION FOR DIRECTED VERDICT

Defendant's fourth assignment of error claims that the trial court erred in overruling his motion for a directed verdict, which was made at the close of the State's case in chief. A defendant who moves for a directed verdict at the close of the plaintiff's evidence and, upon the overruling of such motion, proceeds with trial and introduces evidence waives any error in the ruling on the motion for a directed verdict. *State v. Thomas*, 238 Neb. 4, 468 N.W.2d 607 (1991). In this case, Kosmicki introduced evidence after his motion for a directed verdict was overruled, thereby waiving any error there may have been on the ruling.

SENTENCE

Having been convicted of delivering a controlled substance, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Cum. Supp. 1988), a Class III felony, Kosmicki was subject to not less than 1 nor more than 20 years' imprisonment, up to a $25,000 fine, or both. Neb. Rev. Stat. § 28-105 (Reissue 1985). In his fifth and final assignment of error, the defendant claims that the sentence imposed upon him of not less than 2 nor more than 3 years is excessive. He argues that he was rated as a poor risk for probation solely because of his diagnosis as a paranoid schizophrenic, and thus he is being punished for his illness and not for his crime.

A sentence imposed within the statutory limits will not be

disturbed on appeal in the absence of an abuse of discretion by the trial court. *State v. Lixey*, 238 Neb. 540, 471 N.W.2d 444 (1991). A review of the presentence investigation report reflects that Kosmicki has a criminal record dating from 1981, including prior convictions for possession of marijuana and possession of drug paraphernalia. He also has a lengthy history of drug and alcohol abuse, beginning at age 14. The court found Kosmicki not to be a suitable candidate for probation and that if the defendant were to be placed on probation, he would continue to engage in criminal activity.

There was no abuse of discretion by the trial court in its sentencing of the defendant.

The judgment of the district court is affirmed.

AFFIRMED.

FRANK CATLIN, APPELLANT, V. PRAIRIE MARKETING, APPELLEE.
476 N.W.2d 234

Filed October 25, 1991. No. 91-040.

1. **Workers' Compensation: Appeal and Error.** This court will not set aside factual determinations by the Workers' Compensation Court unless those determinations are clearly erroneous.
2. **Workers' Compensation: Evidence: Appeal and Error.** This court must consider the evidence in the light most favorable to the prevailing party in determining the sufficiency of the evidence supporting a finding of fact by the Workers' Compensation Court.
3. **Workers' Compensation: Words and Phrases.** An accident, under the Workers' Compensation Act, is an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.
4. **Workers' Compensation: Proof.** The mere fact that one may become ill or experience pain during employment does not in and of itself prove that the employee is disabled as a result of an accident arising out of and in the course of employment, entitling the individual to compensation under the Workers' Compensation Act.
5. **Workers' Compensation: Expert Witnesses.** The "objective symptoms" requirement of the Workers' Compensation Act is satisfied where either the nature and effect of the injury are plainly apparent or there is expert testimony showing a causal connection between the injury and the claimed disability.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Roy A. Sheaff, of Sheaff Law Offices, for appellant.

Allen J. Potts and Ronald E. Frank, of Sodoro, Daly & Sodoro, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Plaintiff, Frank Catlin, appeals an order of dismissal entered by a three-judge panel of the Workers' Compensation Court. Compensation was sought by the plaintiff for back injuries he alleged arose from his employment by the defendant, Prairie Marketing. The compensation court found that plaintiff failed to prove by a preponderance of the evidence that he suffered an accident as that term is defined in Neb. Rev. Stat. § 48-151(2) (Reissue 1988). We affirm.

This court will not set aside factual determinations by the Workers' Compensation Court unless those determinations are clearly erroneous. *Tarvin v. Mutual of Omaha Ins. Co.*, 238 Neb. 851, 472 N.W.2d 727 (1991). This court must consider the evidence in the light most favorable to the prevailing party in determining the sufficiency of the evidence supporting a finding of fact. *Id.*

The evidence submitted to the trial court consisted of direct testimony by the plaintiff, portions of the testimony received at the hearing before one judge of the compensation court, and various medical reports.

On February 1, 1986, Catlin worked a 24-hour shift at his job as a truckdriver for Prairie Marketing. The following day, Catlin was unable to get out of bed because he "couldn't get [his] legs to work," and because of pain in his lower back.

The record does not disclose exactly how, when, or where Catlin was injured. He said that his job involved driving a truck, mechanical work, working in the shop, and a lot of heavy lifting, as well as occasionally loading and unloading his truck. It is unclear which, if any, of these activities caused his back symptoms.

Catlin testified that on February 1, 1986, he worked 13 hours in Prairie's plant. He then drove a truck to Scottsbluff, unloaded the truck, and returned to Lincoln. Apparently, Catlin had to perform lifting tasks to unload the truck. The record is otherwise largely devoid of details as to Catlin's activity during any portion of his Scottsbluff trip.

According to Catlin, the road he took on February 1 was "pretty rough." He said that the truck he was driving had a seat which allowed him to "bounce" as he drove over the rough road.

Catlin testified variously to feeling his back "give," feeling something "pop," and feeling "a sharp pain." The "give" was described as happening "in the western part of the state there," just as Catlin was "getting to finish up loading"; the "pop" apparently occurred while Catlin was bouncing in the truck's seat on the rough road; and the "sharp pain" occurred either "on the return trip back" or "after the last load," while Catlin was "running empty."

According to the history contained in Dr. Leonard Weber's report, which history was obtained from Catlin, "He does not know of anything that provoked this [pain]." The history contained in Dr. Michael Morrison's report was simply that "he apparently went to get out of bed after a long truck ride and experienced pain in his lower back with radiation into his right leg."

In Dr. Thomas Green's report, he stated, "In regards to the history I was given from Mr. Catlin on 2-3-86, Mr. Catlin reported he had driven 823 miles and made '3 drops' in twenty-three hours. He had also lifted boxes loading and unloading."

At the first hearing, Catlin testified that "I was out in the western part of the state there and just getting to finish up loading, and I felt my back give." During the course of Catlin's testimony, the compensation court judge asked what happened to him. Catlin replied:

> To clear it up, when I got unloaded out in Scottsbluff, you got a single-axle trailer and a single-axle tractor, and it's pretty rough road out there. Well, I had a seat in there that had a little gap in it, and it was an '83 or '84, I can't

remember now.

But I felt a — something pop there. But you're getting a lot of bounce. It didn't have the newer seating, had the old Boston style seat. Well, I didn't think nothing of it; just like you get gas in your stomach out there on the road, you don't think nothing of it.

The judge questioned Catlin further:

Q. Mr. Breiner asked you the questions; you said that you were loading the truck and you felt a pain in your back. At least that's the way I understood it.

A. Yes.

Q. Three minutes ago, you told me that the jiggling of the seat, bouncing of the seat cushion in the seat, the gap in the seat —

A. Uh-huh.

Q. — caused you a pain in your back.

A. (The witness nods.)

Q. Okay. You've apparently told the doctors that you had just been doing some heavy work. What happened on February 1, 1986?

. . . .

Q. . . . .

Was there anything — and I don't want to put words in your mouth either, but was there anything on February 1, 1986, that you remember doing that caused a back pain or —

A. No. I don't remember of any, any kind of — right at that time, no.

Q. All right.

Finally, during direct testimony at the rehearing, Catlin's testimony was as follows:

Q. What happened after you finished your run on February 1, 1986?

A. That's when I — After the last load, I was running empty, and I felt a sharp pain in my back. Then I went in and dropped the trailer at the plant and took the tractor home.

The accident which Catlin alleged in his petition was that he had worked 16 straight hours at Prairie's plant and proceeded to

drive his truck along his designated route, and after sleeping, he awoke with pain in his lower back and right leg. Dr. Green, the chiropractor who originally treated Catlin, opined that Catlin's back injury was a result of the prolonged driving and lifting which he had performed.

Catlin does not explain in his argument how working 16 hours and driving his truck constitute an accident. An accident, under the Workers' Compensation Act, is "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." § 48-151(2). In order to have been the result of an accident, Catlin's injury must have been unexpected or unforeseen, have occurred suddenly and violently, and have produced objective symptoms. See *Masters v. Iowa Beef Processors*, 220 Neb. 835, 374 N.W.2d 21 (1985).

> "The mere fact that one may become ill or experience pain during employment does not in and of itself prove that the employee is disabled as a result of an 'accident' arising out of and in the course of employment, entitling the individual to compensation under the act. . . ."

Hamer v. Henry, 215 Neb. 805, 808, 341 N.W.2d 322, 325 (1983). In light of the record, viewed most favorably to Prairie, a finding that Catlin's injury did not occur "suddenly and violently" so as to support a finding that he did not suffer an accident within the meaning of the Workers' Compensation Act would not be clearly erroneous.

Furthermore, the record does not support a finding that whatever happened produced objective symptoms within the meaning of the Workers' Compensation Act. The "objective symptoms" requirement of the act is satisfied where either the nature and effect of the injury are plainly apparent or there is expert testimony showing a causal connection between the injury and the claimed disability. *Mack v. Dale Electronics, Inc.*, 209 Neb. 367, 307 N.W.2d 814 (1981). It is not plainly apparent how driving or unloading a truck causes a back injury, where there is no specific evidence of the circumstances under which the injury occurred. Moreover, Dr. Green's opinion was simply that Catlin's back injury was a result of the prolonged driving and lifting he had performed. There was no medical

testimony as to how a specific activity caused Catlin's symptoms. Dr. Ronald Schwab, an orthopedic physician, stated in his report that Catlin has "possible degenerative spondylolisthesis L5 on S1, possible herniated lumbar disc," but offered no suggestion as to the cause of such condition. A similar diagnosis was made by both Dr. Weber, a neurologist, and Dr. Morrison, an orthopedic surgeon, with no suggestion as to the cause, except in the case of Dr. Morrison, who said the condition was longstanding, "which he apparently has aggravated recently." Upon this record, a finding that Catlin had not proved objective symptoms related to any work-induced incident would not be clearly erroneous.

Because findings that Catlin had not proved a sudden and violent injury or demonstrated objective symptoms would not be clearly erroneous, the compensation court's general finding that Catlin had not proved he suffered an accident cannot be clearly erroneous.

The judgment of the compensation court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. WILLIE LOMACK, JR., APPELLANT.

476 N.W.2d 237

Filed October 25, 1991. No. 91-120.

1. **Judgments: Trial: Evidence: Proof: Appeal and Error.** In a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through use of erroneously admitted evidence in a case tried without a jury.
2. **Trial: Evidence: Motor Vehicles: Proof.** Before evidence of a vehicular speed determined by use of radar equipment is admissible, the State, as required by Neb. Rev. Stat. § 39-664(1) (Reissue 1988), must establish the equipment's accuracy when the determination of speed was made.

Appeal from the District Court for Lancaster County, WILLIAM D. BLUE, Judge, on appeal thereto from the County Court for Lancaster County, MARY L. DOYLE, Judge. Judgment of District Court reversed, and cause remanded for a new trial.

John O. Frey, of Vestecka, Buethe & Frey, for appellant.

Norman Langemach, Jr., Lincoln City Prosecutor, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

In a bench trial in the county court for Lancaster County, Willie Lomack, Jr., was convicted of driving an automobile at 32 miles per hour in a 25-mile-per-hour zone, in violation of Neb. Rev. Stat. § 39-662(2)(a) (Reissue 1988) (25 miles per hour in a residential district), and was sentenced to pay a fine of $15 and costs. Lomack appealed to the district court for Lancaster County, which affirmed Lomack's conviction; hence, Lomack appeals to this court and argues that the trial court erred by admitting evidence of the radar-determined velocity of Lomack's automobile.

STANDARD OF REVIEW

Lomack's appeal involves a relatively minor traffic offense in the operation of an automobile at a speed 7 miles per hour greater than that allowed by law. Nevertheless, Lomack, as a criminal defendant, is afforded several constitutional and procedural safeguards, including the due process requirement that every factual element of the offense charged must be proved beyond a reasonable doubt. See *State v. Harney*, 237 Neb. 512, 514, 466 N.W.2d 540, 543 (1991): "Due process in a criminal case requires that the prosecution prove, beyond a reasonable doubt, every factual element necessary to constitute the crime charged against a defendant." Accord *State v. Jasper*, 237 Neb. 754, 467 N.W.2d 855 (1991). See, also, *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

"In a bench trial of a criminal case, the trial court's findings have the effect of a verdict and will not be set aside unless clearly erroneous." *State v. Oldfield*, 236 Neb. 433, 443, 461 N.W.2d

554, 561 (1990). Accord, *State v. Wood*, 220 Neb. 388, 370 N.W.2d 133 (1985); *State v. Craig*, 219 Neb. 70, 361 N.W.2d 206 (1985). Regarding bench trials of a criminal case, that is, cases tried without a jury, this court has often stated:

> [I]n a case tried to the court without a jury, there is a presumption that the trial court, in reaching its decision, considered only evidence that is competent and relevant, and this court will not overturn such a decision where there is sufficient material, competent, and relevant evidence to sustain the judgment.

State v. Schroder, 218 Neb. 860, 869-70, 359 N.W.2d 799, 806 (1984). Accord *State v. Moore*, 226 Neb. 347, 411 N.W.2d 345 (1987). The "presumption" that a trial court, as a fact finder, disregards inadmissible evidence has also been applied in appellate review of civil cases. See, *Suess v. Lee Sapp Leasing, Inc.*, 229 Neb. 755, 428 N.W.2d 899 (1988); *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986). However, what has previously been characterized as a "presumption" that a trial court disregarded inadmissible evidence in a case tried without a jury is not a presumption, i.e., a fact inferred from another known or proved fact or facts, but is really a principle of appellate procedure which requires an appellant to show that the trial court actually used erroneously admitted evidence for the judgment or decision against the appellant. Consequently, in a bench trial of a law action, including a criminal case tried without a jury, erroneous admission of evidence is not reversible error if other relevant evidence, admitted without objection or properly admitted over objection, sustains the trial court's factual findings necessary for the judgment or decision reviewed; therefore, an appellant must show that the trial court actually made a factual determination, or otherwise resolved a factual issue or question, through use of erroneously admitted evidence in a case tried without a jury. See *State v. Thomte*, 226 Neb. 659, 413 N.W.2d 916 (1987).

REQUIREMENTS FOR ADMISSIBILITY OF RADAR-DETERMINED VELOCITY

Before evidence of a vehicular speed determined by use of

radar equipment is admissible, the State, as required by Neb. Rev. Stat. § 39-664(1) (Reissue 1988), must establish the equipment's accuracy when the determination of speed was made. See, *State v. Kudlacek*, 229 Neb. 297, 426 N.W.2d 289 (1988); *State v. Green*, 217 Neb. 70, 348 N.W.2d 429 (1984); *Peterson v. State*, 163 Neb. 669, 80 N.W.2d 688 (1957). Section 39-664(1) specifies the requirements for admissibility of evidence from a radar device:

> Determinations made regarding the speed of any motor vehicle based upon the visual observation of any law enforcement officer may be corroborated by the use of radio microwaves or other electronic device. The results of such radio microwave or other electronic speed measurement may be accepted as competent evidence of the speed of such motor vehicle in any court or legal proceeding when the speed of the vehicle is at issue. Before the state may offer in evidence the results of such radio microwave or other electronic measurement for the purpose of establishing the speed of any motor vehicle, the state shall prove the following:
>
> (a) The measuring device was in proper working order at the time of conducting the measurement;
>
> (b) The measuring device was being operated in such a manner and under such conditions so as to allow a minimum possibility of distortion or outside interference;
>
> (c) The person operating such device and interpreting such measurement was qualified by training and experience to properly test and operate the device; and
>
> (d) The operator conducted external tests of accuracy upon the measuring device, within a reasonable time both prior to and subsequent to an arrest being made, and the measuring device was found to be in proper working order.

This court has consistently held that " '[r]easonable proof that the particular radar equipment employed on a specific occasion was accurate and functioning properly is all that is required.' " *Kudlacek, supra* at 298, 426 N.W.2d at 291. See, also, *State v. Snyder*, 184 Neb. 465, 168 N.W.2d 530 (1969).

A tuning fork test may be sufficient to satisfy the "external test" requirement of § 39-664(1). In *State v. Kincaid*, 235 Neb. 89, 453 N.W.2d 738 (1990), this court upheld a speeding conviction based on radar evidence, when the arresting officer in *Kincaid* had tested the accuracy of his radar unit by using two tuning forks which had been "supplied by the manufacturer and were tested at the factory." *Id.* at 92, 453 N.W.2d at 740. Further, in *Kincaid*, we recognized that a properly conducted tuning fork test was one of two valid methods for demonstrating a radar unit's accuracy and, therefore, the unit's reliability as a source of evidence:

> "Evidence that radar equipment was tested within a few hours of its use, by means of a calibrated tuning fork, or by a comparison with the speedometer of a motor vehicle driven through the radar field, and was functioning properly, is sufficient evidence of the accuracy of the radar equipment."

Id. at 91, 453 N.W.2d at 740 (quoting *State v. Snyder, supra*). *Kincaid*, however, specifically requires that the tuning fork used to test a radar unit must be calibrated, that is, verified or authenticated as a proper instrument for the test. Similarly, in *State v. Kudlacek, supra*, the arresting officer used two tuning forks which had been "certified" at 80 and 35 miles per hour, respectively.

FACTUAL BACKGROUND

Near noon on April 25, 1990, Patrolman Terry Lee Brummer of the Lincoln Police Department was conducting a vehicular speed check by radar at 19th and D Streets in Lincoln and observed an automobile approaching Brummer's position at an estimated speed greater than 25 miles per hour. Brummer glanced at his radar unit, which, by digital readout, indicated the approaching car's velocity at 30 miles per hour. As the car approached Brummer's position, the vehicle accelerated to 32 miles per hour, according to Brummer's radar unit. Brummer then stopped the radar-clocked vehicle driven by Lomack and issued him a traffic citation for driving 32 miles per hour in a 25-mile-per-hour zone.

At Lomack's trial on the charge corresponding to the

citation, Brummer testified that he tested the radar unit before and after issuing the citation to Lomack. On direct examination by the prosecutor, Brummer described a "light test" and an "internal circuitry test" to ascertain whether his radar unit was operating and then testified about an external test involving a tuning fork: "[Y]ou take a tuning fork and tap it on something that is non-metalic and you hold it in front of the radar unit and you get a 35 miles per hour readout and that indicates that your external antenna is working correctly."

Direct examination of Brummer continued: "Q And when you did the tuning fork test, where did — what reading did you get? A 35. Q And was this reading on the tuning fork [sic] consistent with the value inscribed on the tuning fork? A Yes."

Brummer also testified that he repeated the tuning fork test about 1 1/2 hours after issuance of the citation to Lomack: "Q And when you did the tuning fork test [after stopping Lomack], what did you observe? A Top display read out 35."

Lomack made timely objections (relevancy; deficient foundation) regarding introduction of the radar-obtained evidence of his vehicle's velocity. After the court overruled Lomack's objections, Brummer testified concerning the 32-mile-per-hour readout on his radar unit in reference to Lomack's car. The only specific evidence introduced on the issue of speed was Brummer's testimony based on his observations of the radar unit monitored by Brummer at the speed check. The court found Lomack guilty in accordance with the charge against him, a conviction upheld on appeal to the district court.

RADAR-BASED EVIDENCE AGAINST LOMACK

Section 39-664(1) reflects recognition that a motor vehicle's radar-determined velocity is relevant evidence on the issue of the vehicle's speed in reference to a violation of a statutorily prescribed speed limit. "Relevant evidence" is characterized in Neb. Evid. R. 401: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Rev. Stat. § 27-401 (Reissue 1989). However, Neb. Evid. R. 402

provides:

> All relevant evidence is admissible except as otherwise provided by the Constitution of the United States or the State of Nebraska, by Act of Congress or of the Legislature of the State of Nebraska, by these rules, or by other rules adopted by the Supreme Court of Nebraska which are not in conflict with laws governing such matters. Evidence which is not relevant is not admissible.

Neb. Rev. Stat. § 27-402 (Reissue 1989). Thus, relevant evidence is admissible unless excluded by law, including a constitutional provision; a statute, whether state or federal; the Nebraska Evidence Rules; or a rule adopted by the Supreme Court of Nebraska consistent with law governing this court's rulemaking authority. Consequently, in view of Rule 402, relevancy does not assure that evidence is admissible. For example, subject to exceptions, evidence of subsequent remedial measures, although relevant, is inadmissible in a negligence action. See Neb. Evid. R. 407. Other illustrations of inadmissible relevant evidence are found in Neb. Evid. R. 503 to 510, which exclude evidence involving a privilege, and in Neb. Evid. R. 801 and 802, exclusion of hearsay which may contain relevant evidence. Section 39-664(1), therefore, excludes relevant evidence of radar-determined speed unless the State fulfills the requirements for admissibility under the statute.

At Lomack's trial, Brummer indicated that he used an unidentified tuning fork to test the radar unit which supplied information about the speed of Lomack's automobile and stated that the unit displayed the number "35" when the vibrating tuning fork, "inscribed" with a "35," was held in front of the machine. Nevertheless, the radar-based evidence of speed is inadmissible for two reasons in view of § 39-664(1). First, the record fails to establish a particular connection between the tuning fork and Brummer's radar unit. A tuning fork is essentially a two-pronged steel bar that vibrates at a specific individual pitch which is retained almost indefinitely. 27 The Encyclopedia Americana *Tuning Fork* 221 (Int'l ed. 1990); 10 The New Encyclopaedia Britannica, Ready Reference and Index, *Tuning Fork* 184 (15th ed. 1982). Brummer's

testimony fails to establish that the tuning fork in question was particularly designed and intended for testing Brummer's radar unit and thereby fails to show that the tuning fork was in any way associated with the radar unit tested. Without that established relationship between the tuning fork and Brummer's radar unit, evidence of the tuning fork was irrelevant, for, as we expressed in *State v. Lonnecker*, 237 Neb. 207, 210, 465 N.W.2d 737, 740-41 (1991), "[t]o be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving an issue to be decided." Second, even assuming that the tuning fork used by Brummer was recognized as an instrument for testing Brummer's radar unit, there is no evidence that the tuning fork itself was in any way properly tested, calibrated, or certified as a reliable gauge of a radar unit's accuracy. In *State v. Chambers*, 233 Neb. 235, 241, 444 N.W.2d 667, 671 (1989), we stated, "Without some proof of reliability in the device used to test for accuracy in a primary device, a test for accuracy of the primary device is a meaningless exercise," and concluded that the "reasonable proof" standard required by *State v. Kudlacek*, 229 Neb. 297, 426 N.W.2d 289 (1988), and *State v. Snyder*, 184 Neb. 465, 168 N.W.2d 530 (1969), necessitated at least some indication of accuracy in an instrument used to test a measuring device.

The only information offered for the tuning fork's reliability as a testing device is the number "35" inscribed on the tuning fork, the same number that the radar unit displayed when the tuning fork was struck and held in front of the unit. However, the State presented no evidence that this numerical inscription somehow provides a basis for reliability of the tuning fork as a means to test a radar unit, such as verified calibration consistent with the inscription. The most that can be said about the tuning fork in question is that it has been inscribed with a "35." There is a substantial difference and dissimilarity between a device or instrument that is certified or calibrated and one that is merely inscribed. "Certified" means "endorsed authoritatively: guaranteed or attested as to quality, qualifications, fitness, or validity." Webster's Third New International Dictionary, Unabridged 367 (1981). The term

"calibrate" means "to standardize (as a measuring instrument) by determining the deviation from standard [especially] so as to ascertain the proper correction factors." *Id.* at 316. In contrast, the term "inscribed" means "having lines or other markings deeply impressed or having the appearance of written letters." *Id.* at 1168. "Certified" and "calibrated" both connote assurance of accuracy; however, "inscribed" carries no such connotation. "Inscribed," at most, connotes only that something bears an inscription, i.e., something written, and, in Lomack's case, an inscription which, by itself, establishes no significant relationship between the tuning fork and Brummer's radar unit. In short, the record in Lomack's case lacks the indicia of accuracy required by *Kudlacek* and *State v. Kincaid*, 235 Neb. 89, 453 N.W.2d 738 (1990), concerning Brummer's radar unit. Without the requisite proof of accuracy in Brummer's radar unit, evidence of the radar-determined speed of Lomack's vehicle was inadmissible under § 39-664(1).

We note that § 39-664(1) requires a rather uncomplicated procedure to meet the statutory foundation for admission of radar evidence in a contested speeding case: The State must (1) establish the connection between the testing instrument and the radar equipment tested and (2) show that the testing instrument was itself a valid means for testing the radar equipment's accuracy.

Because the State failed to satisfy the requirements for admissibility under § 39-664(1), Brummer's testimony concerning radar-determined velocity of Lomack's car was erroneously admitted and should not have been considered in Lomack's trial. Since inadmissible evidence of radar-determined evidence was the evidence on which Lomack's conviction is based, we set aside Lomack's conviction and remand this cause to the district court with direction to reverse the county court's judgment concerning Lomack's conviction and order a new trial for Lomack in the county court. See, *State v. Chambers, supra*; *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989).

REVERSED AND REMANDED FOR A NEW TRIAL.

BOSLAUGH, J., dissents.

GEORGE E. DITLOFF, PERSONAL REPRESENTATIVE OF THE ESTATE OF MACK J. DITLOFF, DECEASED, APPELLEE, V. LOGAN M. OTTO, JR., APPELLANT.

476 N.W.2d 675

Filed November 1, 1991. No. 89-370.

1. **Judgments: Directed Verdict: Juries.** After a motion for directed verdict at the close of all evidence has been denied by the trial court, Neb. Rev. Stat. § 25-1315.02 (Reissue 1989) authorizes a motion for judgment in accordance with the directed verdict motion, when a jury is unable to reach a verdict and is discharged accordingly.
2. **Judgments: Directed Verdict: Appeal and Error.** Denial of a judgment authorized by Neb. Rev. Stat. § 25-1315.02 (Reissue 1989) is an appealable order.
3. **Judgments: Directed Verdict: Evidence.** A party against whom a judgment is sought pursuant to Neb. Rev. Stat. § 25-1315.02 (Reissue 1989) is entitled to have all relevant evidence accepted or treated as true, every controverted fact as favorably resolved, and every beneficial inference reasonably deducible from the evidence.
4. **Directed Verdict.** A court cannot decide an issue as a matter of law unless the facts adduced on an issue are such that reasonable minds can draw but one conclusion from the evidence. In a jury trial, when evidence compels but one reasonable conclusion regarding an issue or question in the litigation, a court can properly direct a verdict on such issue or question.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Affirmed.

William D. Sutter, of Barlow, Johnson, DeMars & Flodman, for appellant.

Gary J. Nedved, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

George E. Ditloff, as personal representative of the estate of Mack J. Ditloff, deceased (Ditloff), brought a wrongful death action against Logan M. Otto, Jr., in the district court for York County. The claim involved Ditloff's electrocution death, which occurred when a metal grain auger conveyor, being manually moved by Ditloff and Otto, came in contact with an

overhead high-voltage line which delivered electricity to the Otto farmstead.

The negligence claim was based on Otto's failure to warn Ditloff about the overhead wire and keep a proper lookout for the wire while Ditloff and Otto were moving the auger, and on Otto's "moving the auger and letting go of the auger so as to cause it to come into contact with the electric lines." In defense, Otto asserted that Ditloff was contributorily negligent in a manner and degree such that recovery was denied as a matter of law, since Ditloff did not maintain proper lookout for the electric line and moved the auger so that it came in contact with that line.

After Otto's motion for a directed verdict at the conclusion of all evidence, the court overruled Otto's directed verdict motion and submitted the case to the jury. However, after deliberation and a 7 to 5 deadlock, the jury reported that it could not reach a verdict and, for that reason, was discharged by the court. Otto then filed a motion pursuant to Neb. Rev. Stat. § 25-1315.02 (Reissue 1989), which provides in pertinent part:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. . . . [I]f a verdict was not returned [a party who had been denied a directed verdict], within ten days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. . . . If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

The district court denied Otto's motion for judgment; hence, Otto's appeal and contention that, as a matter of law, Otto is entitled to judgment in the wrongful death action.

Section 25-1315.02 is ordinarily used to support a party's motion for a new trial or judgment notwithstanding an adverse jury verdict. See, *Getzschman v. Miller Chemical Co.*, 232 Neb. 885, 443 N.W.2d 260 (1989); *Dunn v. Hemberger*, 230 Neb. 171, 430 N.W.2d 516 (1988); *Lockhart v. Continental Cheese,*

Inc., 203 Neb. 331, 278 N.W.2d 604 (1979). However, after a motion for directed verdict at the close of all evidence has been denied by the trial court, § 25-1315.02 also authorizes a motion for judgment in accordance with the directed verdict motion, when a jury is unable to reach a verdict and is discharged accordingly. See, *Danielsen v. Richards Mfg. Co., Inc.*, 206 Neb. 676, 294 N.W.2d 858 (1980); *Bailey v. Williams*, 189 Neb. 484, 203 N.W.2d 454 (1973); *In re Estate of Fehrenkamp*, 154 Neb. 488, 48 N.W.2d 421 (1951).

Neb. Rev. Stat. § 25-1315.03 (Reissue 1989) states:

> An order entering judgment, as provided in section 25-1315.02, or granting or denying a new trial, is an appealable order. The time for and manner of taking such appeal shall be as in an appeal from a judgment, decree, or final order of the district court in a civil action. The Supreme Court on appeal from an order granting a new trial, or upon review of an order denying a new trial in the action in which such motion was made, or an appeal from the judgment, may order and direct judgment to be entered in favor of the party who was entitled to such judgment.

Although the language in § 25-1315.03 authorizes an appeal from an order (1) granting a new trial, (2) denying a new trial, or (3) granting judgment notwithstanding the verdict, this court has held that the list of appealable orders mentioned in § 25-1315.03 is neither complete nor exhaustive, see *Edquist v. Commercial Sav. & Loan Assn.*, 191 Neb. 618, 217 N.W.2d 82 (1974), and has construed § 25-1315.03 as authorization for an appeal from denial of a judgment after a motion for directed verdict, made at the close of all evidence, has been denied by a trial court and the jury has been discharged as the result of inability to reach a verdict. See, *Danielsen v. Richards Mfg. Co., Inc., supra*; *Bailey v. Williams, supra*; *In re Estate of Fehrenkamp, supra*. As we stated in *Fehrenkamp, supra* at 491, 48 N.W.2d at 424:

> "[S]ection 25-1315.03, R.R.S. 1943, vests the power here on appeal to review the action taken by the trial court *in any action* taken under section 25-1315.02, R.R.S. 1943, and to enter here the judgment in favor of the party who

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> was entitled to the judgment in the trial court." . . . The appeal brings here all matters which were considered by the trial court and which were in effect determined by the trial court under section 25-1315.02, R.R.S. 1943.

(Emphasis in original.) (Quoting *Krepcik v. Interstate Transit Lines*, 153 Neb. 98, 43 N.W.2d 609 (1950).) Hence, denial of a judgment authorized by § 25-1315.02 is an appealable order.

STANDARD OF REVIEW

The standard of review for the appeal of a trial court's denial of judgment pursuant to § 25-1315.02 is the same standard used in an appeal from denial of a motion for directed verdict: "A party against whom [a motion for directed verdict or] a motion to dismiss is directed is entitled to have all relevant evidence accepted or treated as true, every controverted fact as favorably resolved, and every beneficial inference reasonably deducible from the evidence." *Burns v. Veterans of Foreign Wars*, 231 Neb. 844, 850, 438 N.W.2d 485, 489 (1989). Accord, *Dale v. Thomas Funeral Home*, 237 Neb. 528, 466 N.W.2d 805 (1991); *Anderson v. Union Pacific RR. Co.*, 229 Neb. 321, 426 N.W.2d 518 (1988); *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987). Consequently, a party against whom a judgment is sought pursuant to § 25-1315.02 is entitled to have all relevant evidence accepted or treated as true, every controverted fact as favorably resolved, and every beneficial inference reasonably deducible from the evidence.

Moreover,

> [a] court cannot decide an issue as a matter of law unless the facts adduced on an issue are such that reasonable minds can draw but one conclusion from the evidence. . . . In a jury trial, when evidence compels but one reasonable conclusion regarding an issue or question in the litigation, a court can properly direct a verdict on such issue or question.

Anderson v. Union Pacific RR. Co., supra at 323, 426 N.W.2d at 519. Accord, *Burns v. Veterans of Foreign Wars, supra*; *Rahmig v. Mosley Machinery Co., supra.*

Contributory negligence exists when (1) one fails to protect herself or himself from injury, (2) one's conduct concurs and

cooperates with the defendant's actionable negligence, and (3) one's conduct contributes to her or his own injuries as a proximate cause. *Burns v. Veterans of Foreign Wars, supra*; *Lynn v. Metropolitan Utilities Dist.*, 225 Neb. 121, 403 N.W.2d 335 (1987). Accord, *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991); *Jensen v. Archbishop Bergan Mercy Hosp.*, 236 Neb. 1, 459 N.W.2d 178 (1990). See, also, *Mandery v. Chronicle Broadcasting Co.*, 228 Neb. 391, 423 N.W.2d 115 (1988).

> "One who is capable of understanding and discretion but fails to exercise ordinary care and prudence to avoid obvious dangers is negligent or contributorily negligent." . . . "To determine whether conduct constitutes negligence, the invariable standard is reasonable care, although reasonable care is directly proportional to the danger inherent in conduct and may vary depending on the circumstances."

Rahmig v. Mosley Machinery Co., supra at 452, 412 N.W.2d at 75 (quoting *Lynn v. Metropolitan Utilities Dist., supra*). Accord, *Sikyta v. Arrow Stage Lines, supra*; *Anderson v. Union Pacific RR. Co., supra*.

As we expressed in *Holden v. Urban*, 224 Neb. 472, 475, 398 N.W.2d 699, 701 (1987):

> Foreseeability is a factor in establishing a defendant's duty, or, as expressed by Justice Cardozo in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 394, 111 N.E. 1050, 1054 (1916): "[F]oresight of the consequences involves the creation of a duty . . . ." See, also, *Lock v. Packard Flying Service, Inc.*, 185 Neb. 71, 73, 173 N.W.2d 516, 518 (1970): " 'Foresight, not retrospect, is the standard of diligence. . . .' " (Citing and quoting from *Kolar v. Divis*, 179 Neb. 756, 140 N.W.2d 658 (1966).)

Accord *Union Pacific RR. Co. v. Kaiser Ag. Chem. Co.*, 229 Neb. 160, 425 N.W.2d 872 (1988).

> [I]n a jury trial of a negligence action, the trial court must decide whether a plaintiff is guilty of negligence, and, if so, must then decide whether evidence is such that only one reasonable conclusion is permissible—the plaintiff's contributory negligence which, as a matter or law, bars

> recovery and authorizes a directed verdict for the defendant. [Citations omitted.] If, as the result of such initial consideration of the evidence, the trial court determines that the jurors may reasonably draw different conclusions from the evidence, existence of the plaintiff's negligence or contributory negligence and comparative negligence are questions of fact for the jury.

Rahmig v. Mosley Machinery Co., 226 Neb. 423, 451, 412 N.W.2d 56, 75 (1987).

Therefore, we must determine whether, based on the evidence in the record presented to us, there is but one reasonable conclusion: Ditloff was contributorily negligent to such an extent or degree that, as a matter of law, recovery is denied in the action against Otto.

THE ACCIDENT

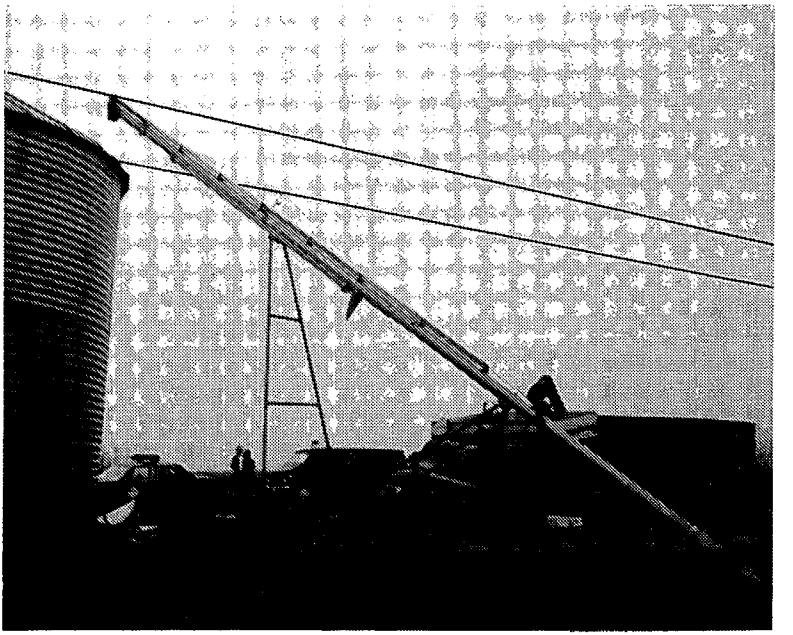
Ditloff, 24 years old, was engaged in general farming operations with his family and used metal augers to store grain in bins. Electrical service for the Ditloff operations was provided by underground wires. Also, Ditloff was a custom combiner, who contracted with Otto for cornpicking in the fall of 1984. However, the custom combining contract did not require Ditloff to put the picked corn into Otto's storage bins; rather, Otto was responsible for placing the harvested crop in the bins. Nevertheless, Ditloff agreed to help Otto in storing the corn in bins near the field harvested.

Otto's storage bins were located near a county road. East-west aerial wires, one carrying 7,200 volts, ran between the county road and the storage bins at the south edge of the Otto property. Poles suspended the clearly visible powerline, with its upper wire, which carried the eventually fatal electricity, 31 feet above ground level.

During the extremely damp morning of October 14, 1984, Ditloff, who had never previously been at the bin site, entered the Otto property via the driveway, where he met Otto, who planned to put corn in one of the steel bins adjacent to the powerline. The bin was 27 feet tall, with a diameter of 26 feet. The bin's roof was conical, with an aperture centered at the apex of the bin. The edge of the bin was 3½ feet from the

powerline, while the hole in the bin's roof was 16 1/2 feet from the powerline. Otto planned to use a metal auger for lifting the corn from ground level to the top of the bin for insertion through the bin's rooftop opening.

The auger actually used is depicted in the following photograph, taken shortly after the accident.



The rigid single-section auger was 57 feet from its head to the opposite end and weighed 1,630 pounds, which included 130 pounds for an electric motor on the auger at a point near the V-brace and toward the bottom of the auger. Raising the auger's head was accomplished by use of a handcrank, located near the bottom of the auger, to retract the brace nearest the spout, reducing the angle at the auger's wheels and thereby elevating the spout. Height of the auger's head was decreased by reversing the process described. Grain entered the auger through an inlet at the bottom of the auger, shown at the lower right of the photograph, and proceeded by an internal elevator to the spout

through which corn would be poured into the granary. When the auger's forward brace was almost fully retracted with the grain inlet on the ground, which was the situation before Ditloff and Otto started moving the auger, the head of the auger was 31 feet above ground level.

The earth around the bin selected by Otto was relatively soft. To move the auger toward the selected bin, Ditloff positioned himself near the bracing, somewhere behind the wheels and toward the auger's inlet. From that position, Ditloff pushed the auger and supplied locomotion for the auger's movement across the ground. At the auger's inlet, 20 feet from the wheels, was Otto, who was able to somewhat control the height of the auger's head by lifting or dropping the bottom of the auger. Also, the auger's lateral movement, that is, movement from side to side, was achieved by manipulation of the bottom of the auger in one direction, causing the auger to pivot on its wheels at the bracing and resulting in a corresponding movement of the auger's head in a direction opposite to that in which the bottom of the auger was moving. The auger's length and weight, coupled with the soft surface, made movement of the auger difficult.

The first effort by Ditloff and Otto to align the auger's spout with the bin's rooftop entry was unsuccessful. Ditloff then placed boards on the ground, which indicated the estimated location for the wheels of the fully elevated auger so that the auger's spout would be above the hole in the bin's roof. With Ditloff positioned at the bracing area and Otto lifting the bottom of the auger, the pair jockeyed the auger toward the location for suitable alignment of the auger and bin. During this second attempt, the auger's head swung about 10 to 20 feet toward the south and the powerline. As the auger's head came close to the powerline, Otto suddenly noticed the auger's approach to the line, immediately let go of the auger, and allowed the bottom of the auger to drop to the ground, elevating the auger's head and bringing it in contact with the powerline while Ditloff was still in contact with the bracing area. The electrical charge transmitted through the auger caused Ditloff's virtually immediate death by electrocution.

Alexander R. Peters, a professor of mechanical engineering

with expertise in the analysis of movement and forces, testified for the plaintiff. Peters had personally inspected the fatal auger, obtained information about all the auger's features, and visited the electrocution site. According to Peters, in view of the auger's center of gravity, center of mass, and the "lever arm principle" for mechanical advantage, a person at the bottom of the auger could not provide impetus in the auger's movement across a surface, but controlled the auger's "swing" or direction as well as the general elevation of the auger's head. Locomotion for the auger's surface movement was supplied by someone in the auger's bracing area who pushed, but was unable to control the auger's left-right or up-down movements. Peters described the auger's overall movement during efforts by Ditloff and Otto:

> Well, it is like a teeter-totter. If the lower end is lifted the upper end is lower and when you release the lower end it comes to the ground, the upper end has contact with the wire so if he had not released it the wire would not have been contacted.

DISCUSSION

We cannot state that, by itself, contact with an electric powerline automatically and as a matter of law establishes contributory negligence on the part of one injured or killed by contact with the powerline. Contributory negligence must always be examined in the light of the particular facts in each case. The duty to make this examination and determination concerning contributory negligence properly belongs to the fact finder unless the evidence compels only one conclusion about which reasonable jurors cannot disagree. See *Rahmig v. Mosley Machinery Co.*, 226 Neb. 423, 412 N.W.2d 56 (1987). Nevertheless, this court has considered several accidental electrocution cases which involved conduct characterized as contributory negligence as a matter of law and, therefore, a bar to recovery against an electric utility or transmission company. See, *Engleman v. Nebraska Public Power Dist.*, 228 Neb. 788, 424 N.W.2d 596 (1988) (moving a grain auger into contact with an open and obvious powerline despite multiple warnings); *Tiede v. Loup Power Dist.*, 226 Neb. 295, 411 N.W.2d 312 (1987) (decedent had warned others and was fully aware of the

danger, yet moved grain auger into powerline from an unsafe direction); *Rodgers v. Chimney Rock P.P. Dist.*, 216 Neb. 666, 345 N.W.2d 12 (1984) (decedent brought a 30-foot well-cleaning tube into contact with a powerline located above a well on his property); *Omaha Nat. Bank v. Omaha P. P. Dist.*, 186 Neb. 6, 180 N.W.2d 229 (1970) (decedent had complained about a powerline located within 8 feet of a shed under construction and later touched powerline with a metal ladder); *Disney v. Butler County Rural P. P. Dist.*, 183 Neb. 420, 160 N.W.2d 757 (1968) (plaintiff towed an irrigation sprinkler arm into contact with a powerline located above his own driveway). However, Ditloff's case presents a pair who, through collaborative efforts, were attempting to accomplish a project which necessitated basically simultaneous actions by the participants.

As evidenced by the nearly even split among the jurors, who assimilated all the evidence and are a collective embodiment of "reasonable minds," a question or questions remained to be answered for resolution of the wrongful death action. From our review of the record in Ditloff's case, we note questions which are unanswered under the evidence. For example, should Ditloff have foreseen Otto's abrupt action in dropping the end of the auger behind Ditloff when Otto saw the auger's imminent contact with the powerline? Given their different roles and division of labor in moving the auger, could Ditloff reasonably rely on Otto's being careful in maneuvering the auger? If Ditloff's attention was focused on the desired position for the auger's wheels, marked by location of the boards by the bin, could Ditloff reasonably rely on Otto to provide an adequate warning for prospective contact with the powerline? Did Ditloff retain or relinquish control over the auger's direction? Was Ditloff reasonable in leaving the basic directional control for the auger to Otto?

The foregoing questions are not exhaustive or intended to determine the result in any trial of Ditloff's wrongful death action against Otto; rather, the suggested questions illustrate that the evidence is susceptible to various interpretations, which are properly for the fact finder. Hence, the district court correctly refused to enter judgment for Otto. For that reason, the district court's judgment is affirmed.

AFFIRMED.

WILLIAM J. IODENCE, APPELLANT, V. JOHN POTMESIL, APPELLEE.
476 N.W.2d 554

Filed November 1, 1991. No. 89-482.

1. **Courts: Jurisdiction.** County courts can acquire jurisdiction only through legislative enactment.
2. **Decedents' Estates: Actions: Equity: Courts: Jurisdiction.** In common-law and equity actions relating to decedents' estates, the county courts have concurrent original jurisdiction with the district courts.
3. **Actions: Equity: Courts: Jurisdiction.** Save for the county court probate powers and the county courts' limited jurisdiction in granting temporary restraining orders, jurisdiction in equity actions remains in the district courts.
4. **Actions: Injunction: Courts: Jurisdiction.** Insofar as injunction actions are concerned, the statutes place jurisdiction in the district court. The only jurisdiction in regard to injunctions conferred on a county judge is to issue a temporary restraining order when there is no district judge in the county.

Appeal from the District Court for Box Butte County, ROBERT R. MORAN, Judge, on appeal thereto from the County Court for Box Butte County, GLEN A. FIEBIG, Judge. Judgment of District Court affirmed in part, and in part reversed and cause remanded with directions.

Frederick B. Allan, Jr., of Allan, Brauer & Mullally, for appellant.

Terry Curtiss, of Curtiss, Moravek & Curtiss, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

William J. Iodence appeals an order of the district court for Box Butte County affirming the issuance of an injunction by the Box Butte County Court which prohibits Iodence from replanting a grove of trees mowed down by the appellee, John Potmesil.

Since the county court lacked jurisdiction to order injunctive relief in this type of case, we reverse the ruling of the district court and remand the cause with directions.

Iodence successfully brought suit in the county court against Potmesil and received a $4,520 judgment as a result of

Potmesil's destruction of the appellant's trees. On appeal, the district court affirmed that award. Potmesil did not appeal that award, and it is not an issue in the appeal to this court.

Potmesil asked for and received from the county court an order enjoining Iodence from replacing the trees Potmesil had destroyed. Iodence appealed to the district court the granting of the injunction by the county court. The district court affirmed the issuance of the injunction, and Iodence timely appealed to this court.

Iodence's first two assignments of error challenge the county court's power to exercise equity jurisdiction in this case. In holding that the county courts may "exercise powers of a court of equity," the district court relied upon article V, § 1, of the Nebraska Constitution and Neb. Rev. Stat. § 24-517(4) (Reissue 1989). Iodence claims that this reliance was misplaced.

Article V, § 1, provides in part:

> The judicial power of the state shall be vested in a Supreme Court, district courts, county courts, in and for each county, with one or more judges for each county, or with one judge for two or more counties, as the Legislature shall provide, and such other courts inferior to the Supreme Court as may be created by law.

County courts can acquire jurisdiction only through legislative enactment. *Miller v. Janecek*, 210 Neb. 316, 314 N.W.2d 250 (1982).

Except as to the dollar amount in controversy, which has been increased from time to time, § 24-517(4) (originally enacted as § 24-517(3)) has remained the same since its effective date, January 4, 1973, and now provides in relevant part: "Each county court shall have the following jurisdiction: . . . (4) Concurrent original jurisdiction with the district court in all civil actions of any type when the amount in controversy does not exceed fifteen thousand dollars." 1991 Neb. Laws, L.B. 422. Article V, § 9, of the Nebraska Constitution provides: "The district courts shall have both chancery and common law jurisdiction, and such other jurisdiction as the Legislature may provide . . . ."

When enacting the probate code in 1974, the Legislature specifically granted jurisdiction to the county courts to

partition or sell real estate in a decedent's estate during the pendency of the estate proceedings. See Neb. Rev. Stat. § 30-24,109 (Reissue 1989). Partition is an equity action. *Sherman v. Schulz*, 220 Neb. 375, 370 N.W.2d 123 (1985).

In 1985, we recognized that in common-law and equity actions relating to decedents' estates, the county courts have concurrent original jurisdiction with the district courts. See *In re Estate of Steppuhn*, 221 Neb. 329, 377 N.W.2d 83 (1985).

The Legislature has also given the county courts equity power to issue a temporary restraining order when there is no district judge in the county. See Neb. Rev. Stat. § 25-1064(4) (Reissue 1989). It is clear that when the Legislature intends that the county courts exercise equity jurisdiction, it has no trouble in saying so.

The question here is whether the language of § 24-517(4) demonstrates a legislative intent for county courts to exercise equity jurisdiction concurrently with the district courts "in all civil actions of any type when the amount in controversy does not exceed fifteen thousand dollars." The appellee argues that the statutory language "*all* civil actions of *any type*" (emphasis supplied) manifests such an intent. However, without a more clear legislative mandate to vest equity jurisdiction in the county courts under this section, we cannot agree with appellee's contention. Had the Legislature intended § 24-517(4) to include equity actions, it would have clearly stated such intent.

The controlling language in § 24-517(4) is the phrase "when the amount in controversy does not exceed fifteen thousand dollars." In an action for an injunction, there is no amount in controversy. Nor is the statute worded to include actions which do not encompass an amount in controversy.

The Legislature has the power to confer subject matter jurisdiction on the county courts. To date, save for the county court probate powers and the county courts' limited jurisdiction in granting temporary restraining orders, jurisdiction in equity actions remains in the district courts.

After the enactment of § 24-517, we have had occasion to determine the jurisdiction of the lower courts in equity actions. In *Miller v. Janecek, supra*, we reversed a district court ruling

that it had no jurisdiction to hear an action brought by a personal representative of an estate against the decedent's son for conversion of funds and for an accounting. "[S]ince this is an equity action based on constructive trust or, in the alternative, conversion, it must be brought in the District Court. County courts have no equity jurisdiction over this type of action." *Id.* at 320, 314 N.W.2d at 252. See, also, *Village of Springfield v. Hevelone*, 195 Neb. 37, 39, 236 N.W.2d 811, 813 (1975) ("[i]nsofar as injunction actions are concerned, the statutes place jurisdiction in the District Court. . . . The only jurisdiction [in regard to injunctions] conferred on a county judge is to issue a temporary restraining order when there is no District Judge in the county").

We need not address appellant's other assignment of error.

Because the county court lacked jurisdiction to issue an injunction, we also are without the power to adjudicate the merits of issuing an injunction in this case. See *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991). The judgment of the district court as it relates to the injunction issued by the Box Butte County Court is reversed, and the district court is instructed to remand the cause to the Box Butte County Court with directions to vacate the injunction issued by it in this case. The balance of the district court's judgment is affirmed.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

JANA SUE BALFANY, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WILLIAM E. BALFANY, DECEASED, APPELLANT, V. DON BALFANY AND BETTY BALFANY, HUSBAND AND WIFE, APPELLEES.

476 N.W.2d 681

Filed November 1, 1991. No. 89-840.

1. **Demurrer: Pleadings: Appeal and Error.** In reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts well pled and the factual and legal inferences which may reasonably be deduced from such facts, but does not accept conclusions of the pleader.
2. **Demurrer: Pleadings.** When ruling on a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
3. **Demurrer: Pleadings: Words and Phrases.** As used in Neb. Rev. Stat. § 25-806(6) (Reissue 1989) concerning a demurrer, a statement of "facts sufficient to constitute a cause of action" means a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
4. **Divorce: Property: Injunction.** In a marital dissolution proceeding, a temporary restraining order prohibiting transactions involving marital assets or property in which either spouse has an interest maintains the status quo between the parties pending a final resolution of property questions and disposition of respective property interests.
5. **Property: Trusts: Injunction.** Violation of a restraining order, standing alone, is insufficient for imposition of a constructive trust on property which is subject to the restraining order.

Appeal from the District Court for Dawes County: PAUL D. EMPSON, Judge. Affirmed.

G. Kirk Meade, of Nichols, Douglas, Kelly and Arfmann, P.C., for appellant.

James L. Haszard, of McHenry & Flowers, and Bevin B. Bump for appellees.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

Jana Sue Balfany commenced an action against Don and

Betty Balfany to impose a constructive trust on life insurance proceeds. The district court for Dawes County sustained the defendants' demurrers to Jana Balfany's second amended petition and dismissed the action when Jana Balfany elected to stand on her pleading. See *Bert Cattle Co. v. Warren*, 238 Neb. 638, 471 N.W.2d 764 (1991) (dismissal of an action after a demurrer has been sustained to a petition without repleading is a final order).

STANDARD OF REVIEW

In reviewing an order sustaining a demurrer, an appellate court accepts the truth of facts well pled and the factual and legal inferences which may reasonably be deduced from such facts, but does not accept conclusions of the pleader. *Weiner v. Hazer*, 230 Neb. 53, 430 N.W.2d 269 (1988).

> "When ruling on a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial."

Security Inv. Co. v. State, 231 Neb. 536, 538, 437 N.W.2d 439, 442 (1989).

"As used in § 25-806(6) concerning a demurrer, a statement of 'facts sufficient to constitute a cause of action' means 'a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.' " *Schuyler State Bank v. Cech*, 228 Neb. 588, 593, 423 N.W.2d 464, 468 (1988).

JANA BALFANY'S SECOND AMENDED PETITION

Jana and William E. Balfany were married on June 6, 1985, and thereafter resided in Chadron, Nebraska. On July 9, 1985, William Balfany signed a form to designate Jana Balfany as the beneficiary of a $40,000 policy on William's life, a policy issued by American General Life Insurance Company before William's marriage to Jana Balfany.

In 1987, Jana Balfany commenced a marital dissolution action in the district court for Dawes County, which on October

6, 1987, entered an order prohibiting the parties from "in any manner concealing, encumbering, hypothecating, conveying or disposing of any of the property of the marriage except in the ordinary course of business" until further court order. Additionally, on October 13, 1987, the court prohibited the parties from "disposing of, concealing, encumbering, hypothecating or conveying any property of the parties, all until further Order of this Court."

On October 27, 1987, William Balfany signed a change of beneficiary form for the American policy and designated his father, Don Balfany, as the primary beneficiary and his mother, Betty Balfany, as the contingent beneficiary under the policy and, on October 30, purchased an additional life insurance policy from Massachusetts Indemnity and Life Insurance Company in the amount of $100,000, in which Don Balfany was the named beneficiary. William Balfany canceled the American policy on January 10, 1988, and was killed in an automobile accident on January 23, 1988. Proceeds of the Massachusetts policy were paid to Don Balfany.

In her second amended petition, Jana Balfany alleged that "proceeds" of the American policy, the first policy on William Balfany's life, were marital property and, therefore, she had a property interest in the proceeds, which were subject to the restraining orders of October 6 and October 13, 1987. However, Jana Balfany did not allege that she has a property interest in the Massachusetts policy, which was William's second life insurance policy, or an interest in the proceeds from that policy. For that matter, connection between the American and Massachusetts policies is neither asserted nor disclosed.

Jana Balfany further alleged that William Balfany's removing her as beneficiary under the American policy and subsequently canceling the American policy constituted a violation of the restraining orders and were fraudulent and unconscionable conduct which prevented Jana from receiving the insurance proceeds of the Massachusetts policy, the second policy of insurance on William's life. Jana Balfany claimed that as a result of William's actions regarding the insurance policies, Don and Betty Balfany have been unjustly enriched by receipt of proceeds from the Massachusetts policy; hence, a

constructive trust should be imposed on these proceeds, with Don and Betty Balfany as trustees and Jana Balfany as beneficiary.

NATURE OF A CONSTRUCTIVE TRUST

> "A constructive trust is imposed when one has acquired legal title to property under such circumstances that he or she may not in good conscience retain the beneficial interest in the property. In such a situation, equity converts the legal titleholder into a trustee holding the title for the benefit of those entitled to the ownership thereof."

Gottsch v. Bank of Stapleton, 235 Neb. 816, 825, 458 N.W.2d 443, 450 (1990). Accord *Ford v. Jordan*, 220 Neb. 492, 370 N.W.2d 714 (1985).

"A constructive trust is a relationship, with respect to property, subjecting the person who holds title to the property to an equitable duty to convey it to another on the ground that his acquisition or retention of the property would constitute unjust enrichment." *Knoell v. Huff*, 224 Neb. 90, 97-98, 395 N.W.2d 749, 755 (1986).

> Generally, a court, sitting in equity, will not impose a constructive trust and constitute an individual as a trustee of the legal title for property, unless it be shown, by clear and convincing evidence, that the individual, as a potential constructive trustee, had obtained title to property by fraud, misrepresentation, or an abuse of an influential or confidential relationship and that, under the circumstances, such individual should not, according to the rules of equity and good conscience, hold and enjoy the property so obtained.

In re Estate of Lienemann, 222 Neb. 169, 177, 382 N.W.2d 595, 601 (1986).

> As a fraud-rectifying remedy, a constructive trust, even in the absence of the trustee's participation in fraud, is available on the basis of the principle that one who accepts a product of fraud, knowing the means by which the fraud-caused product was achieved, is liable to the defrauded party, although the recipient of the product did not personally participate in the fraud.

Gottsch v. Bank of Stapleton, supra at 826, 458 N.W.2d at 451.

DISCUSSION

The sole question is whether Jana Balfany alleged sufficient facts to state a cause of action for imposition of a constructive trust.

At the outset, we note that the restraining orders, or temporary injunctions, in the dissolution proceedings did not prohibit acquisition of property, but only prohibited activity which affected, or might affect, a spouse's property interest in existing marital property or other property of the parties, including concealment of property.

We conclude that Jana Balfany's second amended petition failed to state facts sufficient for a cause of action because the petition failed to allege (1) that marital assets were used to acquire or maintain William's second policy of insurance, the Massachusetts policy; (2) a factual basis to support allegations of William's fraudulent conduct necessary for a constructive trust under the circumstances; and (3) a factual basis that the defendants were unjustly enriched by the insurance proceeds.

First, the petition in question fails to allege that marital assets were used to acquire or maintain the Massachusetts policy. While the petition alleges that the "proceeds" of the American policy were marital property and, therefore, subject to the restraining orders, Jana Balfany made no similar allegation concerning the Massachusetts policy. The American policy was canceled before William Balfany's death, and, accordingly, no proceeds were paid or payable under the American policy. Therefore, there is neither a policy nor proceeds in which Jana Balfany has an interest to support her claim for a constructive trust regarding the American policy.

Additionally, there is no allegation that Jana Balfany has an interest in either the Massachusetts policy or its proceeds. Significantly, the petition does not allege that marital assets were used to acquire or maintain the Massachusetts policy as property derived from marital assets which were subject to the restraining orders. While proceeds from the cash surrender value, if any, received after cancellation of the American policy might have been marital property, the petition does not allege

that proceeds from surrender of the American policy were involved in acquisition of the Massachusetts policy.

In *Mullikin v. Pedersen*, 161 Neb. 22, 71 N.W.2d 485 (1955), the bankruptcy trustee of a partnership sought to impose a constructive trust on life insurance proceeds payable to Maysel Pedersen, widow of Hilbert F. Pedersen, who, during his lifetime, had been a partner in a retail furniture business. The bankruptcy trustee claimed that Hilbert wrongfully used partnership funds to purchase the insurance policy. At the close of all the evidence the district court sustained Maysel Pedersen's motion for directed verdict and entered judgment for her. This court stated that the bankruptcy trustee had the burden to establish that Hilbert "improperly appropriated assets of the partnership to the payment of the cost of the insurance or of a part of it," *id.* at 32, 71 N.W.2d at 491, and held that the bankruptcy trustee failed to present any evidence that Hilbert used partnership assets to purchase the life insurance policy in question.

Consequently, Jana Balfany's second amended petition failed to allege that William Balfany misappropriated marital assets to acquire or maintain the Massachusetts policy and, in the absence of such an allegation concerning marital assets, the petition failed to state that Jana Balfany has a property interest in the proceeds paid to Don Balfany pursuant to the Massachusetts policy.

Second, Jana Balfany relied on William Balfany's violation of the restraining orders, i.e., William's removing Jana as beneficiary of the American policy and subsequently canceling that policy, to support her allegation of William's fraudulent conduct. " 'Fraud is generally a question of fact, and to be effective as a cause of action or a defense must be pleaded by suitable allegations of fact from which it may be concluded. * * * The mere charge of fraud is a conclusion and presents no issue.' " *Preferred Pictures Corp. v. Thompson*, 170 Neb. 694, 700, 104 N.W.2d 57, 61 (1960). See, also, *Nelson v. Cool*, 230 Neb. 859, 434 N.W.2d 32 (1989).

In a marital dissolution proceeding, a temporary restraining order prohibiting transactions involving marital assets or property in which either spouse has an interest maintains the

status quo between the parties pending a final resolution of property questions and disposition of respective property interests. See, *Wilharms v. Wilharms*, 93 Wis. 2d 671, 287 N.W.2d 779 (1980); *Prince v. Bryant*, 87 Wis. 2d 662, 275 N.W.2d 676 (1979).

In *Wilharms v. Wilharms, supra*, the Wisconsin Supreme Court rejected a contention similar to Jana Balfany's contention in the present case. In *Wilharms*, Barbara and Dennis Wilharms were married in April 1968. Barbara commenced a dissolution of marriage action on October 3, 1975, and on October 8 the court issued a temporary restraining order prohibiting either party from disposing of assets except in the usual and ordinary course of business. At issuance of the restraining order, Dennis owned three life insurance policies which designated Barbara as the primary beneficiary and Dennis' children as contingent beneficiaries. On October 28, 1975, Dennis executed a change of beneficiary form and named William and Eva Wilharms, his parents, as the beneficiaries. Dennis died on December 18, 1975.

The Wisconsin court stated in *Wilharms*:

> As a beneficiary of her husband's life insurance policy, Barbara Wilharms had a property interest in the policy. [Citations omitted.] The change of beneficiary designation disposed of his wife's interest in the policy, and therefore violated the order. But this act is not sufficiently unconscionable or wrongful, to warrant the imposition of a constructive trust on the proceeds of the policies. The temporary order made no mention of life insurance. It is possible that Dennis Wilharms believed that he was acting properly. Even so, if it can be shown that he changed beneficiaries in the policies in order to defraud, or otherwise unconscionably deprive his wife of the policy proceeds, then his actions may warrant the imposition of a constructive trust if the other elements for its imposition have been met. In making this determination, the court should also consider the potentially wrongful conduct of third parties. . . .
>
> Wrongful conduct, however, is not sufficient standing alone. Barbara Wilharms must also demonstrate that the

> property sought to be imposed with a constructive trust equitably belongs to her.

93 Wis. 2d at 679-80, 287 N.W.2d at 784.

We agree with the rationale and principle expressed in *Wilharms* that a violation of a restraining order, standing alone, is insufficient for imposition of a constructive trust on property which is subject to the restraining order. William Balfany may have believed that his actions, changing the beneficiary on the American policy and subsequently canceling that policy, were proper and that these actions were not prohibited by the restraining orders. "The rule is well settled in this state that before a person may be said to be in contempt of court for failure to comply with a restraining order, the evidence must disclose not only the failure to comply with the order but also that the failure was willful." *Malec v. Malec*, 196 Neb. 533, 537, 244 N.W.2d 82, 85-86 (1976). Jana Balfany did not allege William Balfany willfully violated the restraining orders when he changed the beneficiary on the American policy and subsequently canceled that policy. Therefore, Jana Balfany failed to allege facts supporting the allegation that William Balfany acted with fraudulent intent in canceling the American policy.

Similarly, Jana Balfany's petition failed to allege that William Balfany's changing beneficiaries on the American policy and canceling that policy, or his acquisition of the Massachusetts policy, was done with the intent to conceal information from Jana Balfany regarding property which was subject to the restraining orders. In *Christopher v. Evans*, 219 Neb. 51, 55, 361 N.W.2d 193, 196 (1985), we stated:

> *Conceal* means "To hide, secrete, or withhold from the knowledge of others. To withdraw from observation; to withhold from utterance or declaration; to cover or keep from sight. To hide or withdraw from observation, cover or keep from sight, or prevent discovery of." Black's Law Dictionary 261 (5th ed. 1979).

Accord *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990). There is no allegation that William Balfany willfully or intentionally concealed from Jana Balfany the acquisition of the Massachusetts policy. The second amended petition failed

to allege any facts to support an allegation of fraudulent concealment.

Finally, Jana Balfany alleged that Don and Betty Balfany have been unjustly enriched by receipt of the proceeds from the Massachusetts policy. We note that Betty Balfany was not a beneficiary under the Massachusetts policy and, therefore, would, at most, have a contingent interest in proceeds payable to Don Balfany pursuant to the Massachusetts policy. Additionally, there is no allegation of a factual basis to support the assertion of an unjust enrichment to Don Balfany. Also, Jana Balfany did not allege that Don assisted or participated in William Balfany's actions regarding the policies, or even knew that William Balfany had canceled the American policy and had purchased the Massachusetts policy which named Don as beneficiary.

Even if Jana Balfany had alleged that Don knew about the changes to William's life insurance, that knowledge would, standing alone, be insufficient to impose a constructive trust. As we stated in *In re Estate of Lienemann*, 222 Neb. 169, 178, 382 N.W.2d 595, 602 (1986):

> [M]ere receipt of a benefit by a confidant, as the result of a transaction in which the confidant has participated on behalf of or in concert with the entrusting individual, does not, itself, furnish a basis for imposition of a constructive trust on property acquired by or benefiting the confidant as a consequence of the transaction.

CONCLUSION

The district court properly sustained the demurrers of Don and Betty Balfany and, when Jana Balfany elected not to plead further, correctly dismissed Jana Balfany's action.

AFFIRMED.

WHITE, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. GLENN R. WITT, APPELLANT.
476 N.W.2d 556

Filed November 1, 1991. No. 90-758.

Appeal from the District Court for Douglas County: ROBERT V. BURKHARD, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

A jury in the district court for Douglas County convicted Glenn R. Witt of burglary, a violation of Neb. Rev. Stat. § 28-507(1) (Reissue 1989). Burglary is a Class III felony, § 28-507(2), punishable by imprisonment for 1 to 20 years, a $25,000 fine, or both such imprisonment and fine, Neb. Rev. Stat. § 28-105 (Reissue 1989). The district court sentenced Witt to imprisonment for 6⅔ to 20 years.

Witt assigns two errors. Witt contends, first, that the evidence was insufficient to sustain his conviction and, second, that the court imposed an excessive sentence.

SUFFICIENCY OF EVIDENCE

Section 28-507 provides: "(1) A person commits burglary if such person willfully, maliciously, and forcibly breaks and enters any real estate or any improvements erected thereon with intent to commit any felony or with intent to steal property of any value. (2) Burglary is a Class III felony."

In *State v. Tuttle*, 238 Neb. 827, 832, 472 N.W.2d 712, 716 (1991), we stated:

> "In determining whether evidence is sufficient to sustain a conviction in a jury trial, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence presented to a jury, which are within a jury's province for

> disposition. A verdict in a criminal case must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that verdict."

Accord, *State v. Zitterkopf*, 236 Neb. 743, 463 N.W.2d 616 (1990); *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990).

> On a claim of insufficiency of evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.

State v. Robertson, 223 Neb. 825, 830, 394 N.W.2d 635, 638 (1986). Accord, *State v. Tuttle, supra*; *State v. Zitterkopf, supra*; *State v. Reynolds, supra*.

"In reference to § 28-507, the statute which defines burglary, '[i]ntent sufficient to support a conviction for burglary may be inferred from the facts and circumstances surrounding an illegal entry into improvements on real estate.' " *State v. Tuttle, supra* at 833, 472 N.W.2d at 716-17. Accord *State v. Vaughn*, 225 Neb. 38, 402 N.W.2d 300 (1987).

"The intent involved in conduct is a mental process and may be inferred from the conduct itself, the actor's language in reference to the conduct, and the circumstances surrounding an incident." *State v. Pierce*, 231 Neb. 966, 971, 439 N.W.2d 435, 440 (1989). Accord, *State v. Tuttle, supra*; *State v. Swigart*, 233 Neb. 517, 446 N.W.2d 216 (1989). "When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence." *State v. Hoffman*, 227 Neb. 131, 140, 416 N.W.2d 231, 237 (1987).

" 'Circumstantial evidence' means facts or circumstances, proved or known, from which existence or nonexistence of another fact may be logically inferred or deduced through a rational process." *State v. Jasper*, 237 Neb. 754, 763, 467 N.W.2d 855, 862 (1991). Accord *State v. Fleck*, 238 Neb. 446, 471 N.W.2d 132 (1991). "A defendant may be convicted by circumstantial evidence which establishes the defendant's guilt beyond a reasonable doubt. The State is required to establish

the defendant's guilt for the crime charged, but is not required to disprove every hypothesis consistent with the defendant's presumed innocence." *State v. Blue Bird*, 232 Neb. 336, 339, 440 N.W.2d 474, 476 (1989). Accord *State v. Fleck, supra.*

Examining the evidence, which is construed most favorably to the State in light of Witt's conviction, we conclude that the evidence was sufficient to sustain the conviction. In the early morning hours of January 30, 1990, Witt kicked in the door of Dianne Greer's house, breaking the doorjamb and window. In response to Witt's forced entry into her home, Greer called the police immediately, fled from her home, and sought shelter at a neighbor's house. Witt entered Greer's house, took $22 from Greer's wallet and the keys to her Ford Bronco, and then left the house. The police arrived shortly thereafter and observed Witt "just coming out from behind the canopy" by the door of Greer's house. Witt told the officers that he was Greer's boyfriend, that he lived at the residence, that Greer had locked him out of the house after their argument, and that the Ford Bronco belonged to him. During their investigation, police discovered that none of what Witt had told them was true and found that Witt was carrying the keys for the Bronco and money which had been in Greer's wallet. Police arrested Witt, who was later charged with burglary. Witt's conduct in attempting to deceive the police and the fact that he was carrying Greer's property was sufficient evidence for the jury's conclusion that when Witt entered Greer's house, he had the intent to steal property of any value located inside the house.

Accordingly, the evidence at Witt's trial, construed most favorably to the State, supports the jury's finding that Witt "willfully, maliciously, and forcibly" broke into and entered Greer's house "with intent to steal property of any value." See § 28-507(1). Therefore, the evidence is sufficient to sustain Witt's burglary conviction.

EXCESSIVE SENTENCE

Witt was sentenced to imprisonment for $6^2/_3$ to 20 years, a penalty statutorily authorized by § 28-105(1) for a Class III felony. " 'A sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has

abused its discretion in the sentence imposed.' " *State v. Johnson*, 238 Neb. 206, 208, 469 N.W.2d 761, 763 (1991) (quoting from *State v. Kitt*, 232 Neb. 237, 440 N.W.2d 234 (1989)). Accord *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991). This court has also stated:

> [I]n considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment and includes the observations of the sentencing judge as to the demeanor, attitude, and all facts and circumstances surrounding the life of the defendant.

State v. Stranghoener, 208 Neb. 598, 603, 304 N.W.2d 679, 682 (1981). Accord, *State v. Tuttle*, 238 Neb. 827, 472 N.W.2d 712 (1991); *State v. Schall*, 234 Neb. 101, 449 N.W.2d 225 (1989); *State v. Goodpasture*, 215 Neb. 341, 338 N.W.2d 446 (1983).

Witt's criminal record includes prior convictions for felony larceny, armed robbery, unauthorized use of a motor vehicle, burglary, attempted first degree sexual assault, and numerous misdemeanors.

Witt's sentence was clearly within the range of penalties for a Class III felony. Further, in view of the nature of the crime and Witt's extensive criminal history, we cannot say that the district court abused its discretion in the sentence imposed on Witt.

CONCLUSION

Witt's assignments of error are without merit. Accordingly, Witt's conviction and sentence are affirmed.

AFFIRMED.

IRVIN A. ANTHONY, APPELLANT AND CROSS-APPELLEE, V. PRE-FAB TRANSIT COMPANY AND PROTECTIVE INSURANCE COMPANY, APPELLEES AND CROSS-APPELLANTS.

476 N.W.2d 559

Filed November 1, 1991. No. 90-892.

1. **Workers' Compensation: Appeal and Error.** Findings of fact by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong.
2. **Independent Contractor: Employer and Employee.** There is no single test to determine whether a worker is an employee or an independent contractor. The determination must be made from all the facts in the case.
3. _____: _____. The deduction of Social Security and income taxes tends to indicate an employer-employee relationship, while the failure to do so is a contrary indication.
4. **Workers' Compensation: Jurisdiction: Estoppel.** The Nebraska Workers' Compensation Court may not acquire subject matter jurisdiction by estoppel.
5. **Workers' Compensation: Jurisdiction: Proof.** The plaintiff in Workers' Compensation Court must prove his employee status before he may invoke the jurisdiction of the court.
6. **Workers' Compensation: Jurisdiction: Equity.** The Workers' Compensation Court does not have the jurisdiction of a court of equity.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Richard A. Douglas, of Nichols, Douglas, Kelly and Arfmann, P.C., for appellant.

Ronald Frank and Clark J. Vanskiver, of Sodoro, Daly & Sodoro, for appellees.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

This is an appeal from an order of a three-judge panel of the Workers' Compensation Court dismissing the claim of plaintiff-appellant, Irvin A. Anthony, against defendants-appellees, Pre-Fab Transit Company and Protective Insurance Company. The claim was dismissed after the panel found that plaintiff was an independent contractor and not an employee of Pre-Fab. Plaintiff has appealed, assigning as error the actions of the compensation court in

failing to find that "Plaintiff was entitled to benefits from Defendants" and in failing to find that "the Defendants were estopped to deny benefits to the Plaintiff." We affirm.

The record shows the following:

Pre-Fab is a national trucking concern. It receives orders from customers to transport goods and then assigns these orders to truckers with whom it has contracted for transportation. Anthony owned his own truck and trailer. He contracted with Pre-Fab on January 4, 1983, to transport goods.

The contract provided, in part, as follows:

> It is the intention of the parties to this contract that Contractor shall be and remain an independent Contractor and that nothing herein shall be construed as inconsistent with that status; also, neither Contractor, his drivers, employees, agents, or servants are to be considered drivers, employees, agents or servants of Carrier at any time, under any circumstances, or for any purpose.

Anthony's equipment is described in detail in the contract, and the contract requires that Anthony use that equipment in performing the contract. Anthony's compensation was 75 percent of the revenue received by Pre-Fab on each haul Anthony made. Pre-Fab paid Anthony only for hauling the loads; it did not pay him while he was driving with an empty truck to pick up a load, nor did it pay him for time he spent maintaining or inspecting his equipment. Anthony indicated that he was self-employed on his income tax forms, paid his own taxes, and took his own business deductions. Anthony received a 1099 form from Pre-Fab, which indicates the compensation paid for a contractor, as opposed to a W-2 form, which is generally used for employees. Pre-Fab did not withhold income or Social Security taxes, and Anthony did not receive vacation or holiday pay from Pre-Fab, nor did he participate in any other employment benefits.

Pre-Fab assumed liability for the property transported and also for other personal and property damage, except damage to Anthony or any of Anthony's employees. Anthony was liable for loss of or damage to his own equipment or to any equipment

used by Anthony which he did not own. Anthony was required to insure against liability arising from the use of his equipment when he was not performing under the contract. Anthony was also responsible for obtaining bobtail insurance, which is liability insurance in effect when the truck is traveling without a trailer.

Pre-Fab paid highway use taxes and fuel mileage taxes. Anthony was required to post a performance bond, and, in addition, Anthony was responsible for all operating expenses, including license fees.

Anthony had the right to hire employees, but the contract specifically provided that any employees would be Anthony's employees, not Pre-Fab's. Before Anthony could employ a driver, however, Pre-Fab had to approve the driver. The only two approved drivers for Anthony's truck were Anthony and his wife. Pre-Fab never approved any other drivers, and Anthony never had an employee.

Pre-Fab did not have authority over the selection or maintenance of Anthony's equipment, the selection of routes and facilities, or the determination of whether Anthony would accept a particular assignment. Pre-Fab did require, however, that inspectors at Pre-Fab's terminals inspect Anthony's equipment once a month.

The contract did not require Anthony to work exclusively for Pre-Fab, but allowed for "trip-leases" under certain circumstances. When trip-leasing, Anthony was required to submit logs to Pre-Fab and to communicate daily with Pre-Fab's dispatch centers. During the period that Anthony was under contract to Pre-Fab, he worked almost exclusively for Pre-Fab, trip-leasing only three times. Pre-Fab did not receive a commission for Anthony's trip-leases.

Pre-Fab purchased workers' compensation insurance that covered, at least primarily, employees and independent contractors' employees. The policy contains a classification for "Trucking NOC [not otherwise classified] & drivers." Pre-Fab's director of safety and risk management testified that "drivers" referred to employees that drive Pre-Fab company trucks.

Anthony testified he received a letter from Pre-Fab in September 1985, explaining that because of rising costs of

workers' compensation insurance, the drivers who wished to continue workers' compensation through Pre-Fab would be charged $55 per month to cover the increased costs. If Anthony wished to continue coverage through Pre-Fab, he was to sign the letter and return it to Pre-Fab, which he did. This testimony was corroborated by the testimony of Mrs. Anthony and the testimony of another driver for Pre-Fab. Although requested by interrogatory, no such letters were produced by Pre-Fab or presented by Anthony.

In October 1985, Pre-Fab began deducting $55 a month from Anthony's settlement sheets. The deduction was marked "Misc W COMP." Pre-Fab admits that this money was deducted for workers' compensation insurance. The deduction was mandatory unless the trucker provided Pre-Fab with a certificate of insurance that "he had provided his own workers' compensation coverage." Pre-Fab testified this contractual provision was to protect Pre-Fab from being held liable as a "statutory employer" if one of Pre-Fab's independent contractors did not provide coverage for the independent contractor's employees.

Anthony was not listed as an employee on Pre-Fab's insurance application, but he was included in computing the premium for the policy. A Pre-Fab official testified that the $55 deduction was reflected in the estimated annual premium for Nebraska drivers and that the money contributed to Pre-Fab's own workers' compensation premium.

Anthony testified that he believed that the $55 per month was deducted to provide workers' compensation coverage for himself. He testified that he spoke to several terminal managers about the letter of September 1985, and they led him to believe he was covered.

On November 27, 1985, Anthony called the Pre-Fab terminal in Denver, Colorado, and was told to be in Denver the morning of December 2 to pick up a load. On November 30, 1985, Anthony had his truck washed at a truck wash in Scotts Bluff County, Nebraska. Anthony testified that washing the truck is preventive maintenance, intended to maintain the value of the equipment. Anthony testified that Pre-Fab required the truckers to keep the equipment clean.

Anthony arranged to pay an extra $10 to the truck wash operator to leave the truck in the wash overnight so that the windows and doors would not be frozen shut the next morning. Anthony went to pick up the truck the following morning. He performed part of the pretrip inspection while the truck was still in the truck wash and intended to take the truck to another location to change the oil. While putting additives in the fuel tanks, Anthony slipped and fell on ice in the truck wash and injured his back, causing the injury which is the subject of this case. Anthony lost consciousness when he fell and suffered a concussion.

Findings of fact by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly wrong. *Cline v. County Seat Lounge, ante* p. 42, 473 N.W.2d 404 (1991).

We have held that there is no single test to determine whether a worker is an employee or an independent contractor, but the determination must be made from all the facts in the case. *Stephens v. Celeryvale Transport, Inc.*, 205 Neb. 12, 286 N.W.2d 420 (1979); *Voycheske v. Osborn*, 196 Neb. 510, 244 N.W.2d 74 (1976).

We further said, in *Knowlton v. Airport Transportation Co.*, 235 Neb. 96, 99, 454 N.W.2d 278, 280 (1990), quoting from *Stephens v. Celeryvale Transport, Inc., supra*, that

> "[w]here a written contract between the claimant and alleged employer exists, which not only denominates the relationship as that of independent contractor but also describes that kind of relationship, and nothing in the manner of performance by the parties is inconsistent with the relationship described, then the independent contractor is, as a matter of law, bound by the contract and is not to be deemed an employee within the meaning of the workmen's compensation statutes."

The written contract in this case defined the status of Anthony between the parties as an independent contractor. Interpreted in a light most favorable to the defendants, nothing in the manner of performance of Pre-Fab or Anthony contradicts this contractual statement.

Various tests to determine whether a worker is an employee or an independent contractor were discussed in *Eden v. Spaulding*, 218 Neb. 799, 359 N.W.2d 758 (1984). Among those tests is one concerning whether Social Security taxes and withholding taxes are deducted from the worker's payment. We said in *Eden* at 807, 359 N.W.2d at 763, " 'The deduction of social security taxes and the withholding of income tax tends to indicate an employer-employee relationship, while the failure to do so is a contrary indication.' " In this case, there were no such deductions, indicating an independent contractor status.

We have reviewed the entire record in view of the other tests set out in *Eden v. Spaulding, supra*. Application of those tests to the facts in this case leads to the conclusion that the compensation court did not err in finding that Anthony was an independent contractor in regard to Pre-Fab. The facts in this case are virtually indistinguishable from the facts in *Stephens v. Celeryvale Transport, Inc., supra*. That case controls the disposition of this case.

Anthony contends that "[t]he main issue in this case is whether the defendants are estopped from contending that Mr. Anthony was not covered by Workers' Compensation Policy #RWC8171 which was received into evidence as Exhibit 15." Brief for appellant at 15. We hold that contention cannot be decided by the compensation court because that court has no jurisdiction to determine estoppel issues which, in this case, are equitable in nature.

We have said, " 'It is axiomatic, however, that the parties cannot confer subject matter jurisdiction upon a judicial tribunal by either acquiescence or consent.' " *Black v. Sioux City Foundry Co.*, 224 Neb. 824, 829, 401 N.W.2d 679, 682 (1987).

Other courts have gone further. Subject matter jurisdiction cannot be created by waiver, estoppel, consent, or conduct of the parties. *Mahoney v. Northwestern Bell Telephone Co.*, 377 F.2d 549 (8th Cir. 1967); *Bandfield v Wood*, 104 Mich. App. 279, 304 N.W.2d 551 (1981); *Nelson v. Iowa-Illinois Gas & Elec. Co.*, 259 Iowa 101, 143 N.W.2d 289 (1966); *Steffens v. Proehl*, 171 N.W.2d 297 (Iowa 1969).

We hold that the Nebraska Workers' Compensation Court

may not acquire subject matter jurisdiction by estoppel.

The plaintiff must prove his employee status before the Workers' Compensation Court can exercise its jurisdiction to afford relief to the plaintiff. Employee status is an essential element in establishing jurisdiction of the compensation court. In *Scholz v. Industrial Comm.*, 267 Wis. 31, 40, 64 N.W.2d 204, 209 (1954), the court stated:

> In order for an applicant employee to establish a valid claim for workmen's compensation benefits against an alleged employer or the latter's insurance carrier, the employee has the burden of establishing that he was *the employee* of such alleged employer at the time of injury. . . . We, therefore, have no issue presented of a so-called affirmative defense which is subject to waiver, but rather a failure of the applicant to prove an essential element of his case, viz., that he was the employee . . . at the time of injury.

(Emphasis in original.)

Either party may raise the jurisdictional issue at any time. See *Production Credit Assn. of the Midlands v. Schmer*, 233 Neb. 785, 448 N.W.2d 141 (1989). The defendant need not plead lack of jurisdiction as an affirmative defense. See *Blitzkie v. State*, 216 Neb. 105, 342 N.W.2d 5 (1983).

The holdings that jurisdiction may not be obtained by estoppel are particularly strong when the court is one created by statute, with limited jurisdiction. It has been determined by other states that workers' compensation courts in those states may not exercise equity jurisdiction, because legislatures in those states have not granted the compensation courts equitable powers. See, *Castro v. Viera*, 207 Conn. 420, 541 A.2d 1216 (1988); *Auto-Owners Ins Co v Elchuk*, 103 Mich. App. 542, 303 N.W.2d 35 (1981). In *Sieman v Postorino Co*, 111 Mich. App. 710, 716, 314 N.W.2d 736, 739 (1981), the Michigan Court of Appeals stated:

> Although the WCAB [Workers' Compensation Appeal Board] performs quasi-judicial duties, it is not possessed of inherent judicial power. . . . Rather, the board is a statutory body with specific legislatively created powers. In particular, the board lacks jurisdiction to pass upon

> equitable claims. . . . The WCAB acted properly in the instant case in declining to rule on Postorino's estoppel theory.

The Nebraska Workers' Compensation Court has only the "authority to administer and enforce all of the provisions of the Nebraska Workers' Compensation Act, and any amendments thereof, except such as are committed to the courts of appellate jurisdiction." Neb. Rev. Stat. § 48-152 (Reissue 1988). The Nebraska Supreme Court has refused to extend jurisdiction to the Workers' Compensation Court to determine insurance coverage disputes because no statute expressly conferred that authority. See *Thomas v. Omega Re-Bar, Inc.*, 234 Neb. 449, 451 N.W.2d 396 (1990). "The Workers' Compensation Court is a tribunal of limited and special jurisdiction and has only such authority as has been conferred on it by statute." *Thomas, supra* at 452, 451 N.W.2d at 398.

Similarly, in *Smith v. Fremont Contract Carriers*, 218 Neb. 652, 358 N.W.2d 211 (1984), this court would not allow the Workers' Compensation Court to hear a motion to amend its prior award. Although a court of general jurisdiction has the power to vacate or modify its own judgment under the common law, statutory courts do not have the same power. *Smith, supra*. In *Bituminous Casualty Corp. v. Deyle*, 234 Neb. 537, 451 N.W.2d 910 (1990), this court used similar reasoning to determine that the Workers' Compensation Court had no authority to enter an award of postjudgment interest.

No Nebraska statute grants equity jurisdiction to the Workers' Compensation Court. Estoppel allegedly arising because of Pre-Fab's conduct is an equitable remedy. We hold that the Workers' Compensation Court has no jurisdiction to determine the estoppel issue raised by Anthony. We do not reach the question whether Pre-Fab is estopped to deny coverage of Anthony.

The compensation court did not err in ruling as it did. Because of our disposition of this case on these grounds, we do not reach the appellant's other assignments of error nor the appellees' cross-appeal. The judgment of the compensation court is affirmed.

AFFIRMED.

WHITE, J., participating on briefs.

HARVEY J. SCHMID, APPELLEE, V. NEBRASKA INTERGOVERNMENTAL RISK MANAGEMENT ASSOCIATION AND CUSTER COUNTY, NEBRASKA, APPELLANTS.

476 N.W.2d 243

Filed November 1, 1991. No. 91-085.

1. **Workers' Compensation: Proof.** For an award based on disability, a claimant must establish, by a preponderance of the evidence, that the employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act.
2. **Workers' Compensation.** If an employee, after a work-related injury, receives wages equal to or greater than the wages received before the injury, the wages may be considered in the determination whether an employee has sustained an impairment of earning capacity.
3. _____. Whether a claimant has sustained disability which is total or partial and which is temporary or permanent is a question of fact.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Dallas D. Jones, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellants.

William J. Ross, of Ross, Schroeder & Brauer, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

Nebraska Intergovernmental Risk Management Association (NIR) and Custer County, Nebraska, appeal from a workers' compensation award on rehearing to Harvey J. Schmid and contend that the compensation court erred (1) by finding that Schmid's medical treatment and disability were compensable and (2) in the method of determining Schmid's disability benefits.

STANDARD OF REVIEW

"Findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. . . . In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light

> most favorable to the successful party. . . . Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. . . . As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony."

Tarvin v. Mutual of Omaha Ins. Co., 238 Neb. 851, 852, 472 N.W.2d 727, 729 (1991). Accord, *Roan Eagle v. State*, 237 Neb. 961, 468 N.W.2d 382 (1991); *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990); *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988); *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). See Neb. Rev. Stat. § 48-185 (Reissue 1988).

"[F]or an award based on disability, a claimant must establish, by a preponderance of the evidence, that the employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act." *Heiliger v. Walters & Heiliger Electric, Inc., supra* at 468-69, 461 N.W.2d at 572-73. Accord, *Tarvin v. Mutual of Omaha Ins. Co., supra*; *Roan Eagle v. State, supra*. See, also, *Grauerholz v. Cornhusker Packing Co.*, 230 Neb. 641, 432 N.W.2d 831 (1988).

> In considering whether evidence sustains a finding for an award or dismissal by the Nebraska Workers' Compensation Court on rehearing, an appellate court does not reweigh evidence, but considers the compensation court's award or dismissal in a light most favorable to the successful party and resolves evidential conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.

Roan Eagle v. State, supra at 962-63, 468 N.W.2d at 384-85.

FACTUAL BACKGROUND

Schmid began working as a general laborer for Custer County on May 1, 1989, and was injured on May 3, while helping a mechanic replace dual rear wheels on a county truck. While replacing a set of duals, Schmid braced his feet and grasped one of the truck tires, but his hands slipped from the tire, causing Schmid to stumble backward and later experience pain in his right leg and lower back. The mechanic working with Schmid saw him stumble backward while the pair was replacing the truck tires. Later on May 3, after the tire incident, Schmid's coemployees noted that he was in pain and that Schmid had difficulty in moving his right leg. That night, as a result of the pain in his back and right leg, Schmid had difficulty sleeping. The following morning, Schmid's wife drove him to a hospital emergency room. Schmid's physicians undertook a program of conservative medical treatment to alleviate Schmid's condition. When that approach failed to result in improvement, Dr. Ramon R. Salumbides, a neurosurgeon, performed an extensive hemilaminectomy at the L3-4 level of Schmid's spine on May 11 and excised a herniated disk with its extruded fragments. Schmid was unable to return to work until June 26, 1989, when he resumed "light duty" labor as a truckdriver and was limited to "relatively sedentary type work," although Schmid was paid wages at a rate 42 cents per hour greater than the wage rate paid to Schmid on May 3, 1989.

Before his employment with Custer County, Schmid had sustained a work-related injury in 1986, when he injured his back while he was climbing a ladder, an injury which necessitated a partial hemilaminectomy at L3-4 in Schmid's back. After the 1986 surgery, Schmid experienced no back problem, resumed labor which involved carrying various objects, and needed no further medical attention regarding his back until the injury on May 3, 1989. As expressed by Dr. Salumbides, "It is my opinion based on medical probability that the recurrent herniated disc for which Mr. Schmidt [sic] had surgery on May 11, 1989, was secondary to the accident that occurred while at work on May 3, 1989." Also, Dr. Salumbides expressed the opinion that "based on medical probability [Schmid] will have a permanent physical

impairment of approximately twenty percent because of the previous back surgery as well as recurrent pain in his back and right lower extremity." A vocational rehabilitation expert, having considered Schmid's injury in relation to his work training and experience or skills, concluded that Schmid "has suffered a loss of earning capacity of approximately 15 percent as a result of his back injury on May 3, 1989."

In its award, the Workers' Compensation Court concluded that Schmid was injured as the result of a work-related accident in his employment on May 3, 1989, and that he had sustained a "20 per cent permanent partial disability to the body as a whole."

DISCUSSION

Without restating all the evidence previously noted in the factual background section, we conclude that evidence sustains the compensation court's finding that Schmid was involved in a work-related accident on May 3, 1989, which resulted in his bodily injury and caused a physical disability to Schmid.

Neb. Rev. Stat. § 48-121(2) (Reissue 1988) provides that compensation awarded a claimant for partial disability is based on a percentage "of the difference between the wages received at the time of the injury and the earning power of the employee thereafter." NIR and Custer County argue that the compensation court failed to follow the statutory directive in § 48-121(2), because the compensation court awarded Schmid benefits based on 20 percent permanent partial disability to the body as a whole despite Schmid's postaccident wage rate at 42 cents per hour more than his wage rate when he was injured on May 3, 1989.

In *Thom v. Lutheran Medical Center*, 226 Neb. 737, 740, 414 N.W.2d 810, 813-14 (1987), this court stated:

> Earning power, as used in Neb. Rev. Stat. § 48-121(2) (Cum. Supp. 1986), is measured by an evaluation of a worker's general eligibility to procure and hold employment, the worker's capacity to perform the required tasks, and the worker's ability to earn wages in employment for which he or she is engaged or fitted. [Citation omitted.] Earning power is synonymous neither

> with wages [citation omitted] nor with loss of physical function [citation omitted]. Nonetheless, loss of physical function may affect a worker's eligibility to procure and hold employment, his or her capacity to perform the required tasks, and the ability to earn wages in employment for which he or she is engaged or fitted. Thus, while there is no numerical formula for determining one's earning power following an injury to the body as a whole [citation omitted], the extent of such impairment or disability may provide a basis for determining the amount of that worker's loss of earning power.

Also, we stated in *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 912, 464 N.W.2d 343, 351 (1991):

> [A]ccording to Professor Arthur Larson, "Compensable disability is generally defined as inability, as the result of a work-connected injury, to perform or obtain work suitable to claimant's qualifications and training." 2 A. Larson, The Law of Workmen's Compensation § 57.22(a) at 10-129 (1989). Hence, the test for a worker's employability after a compensable injury is whether the worker can compete in the open and normal labor market for the worker's services.

While it is true that disability under § 48-121(2) is expressed " 'in terms of employability and earning capacity rather than in terms of loss of bodily function,' " *McGee v. Panhandle Technical Sys.*, 223 Neb. 56, 64, 387 N.W.2d 709, 714 (1986), this court has, on numerous occasions, followed the rule that " 'the mere fact that after the injury the employee receives, or is offered, his former wages, or a larger sum, does not necessarily preclude recovery of compensation under the various workmen's compensation statutes.' " *Micek v. Omaha Steel Works*, 135 Neb. 449, 451, 282 N.W. 262, 264 (1938). See, also, *Guerra v. Iowa Beef Processors, Inc.*, 211 Neb. 433, 318 N.W.2d 887 (1982); *Akins v. Happy Hour, Inc.*, 209 Neb. 236, 306 N.W.2d 914 (1981); *Colgrove v. City of Wymore*, 184 Neb. 712, 171 N.W.2d 639 (1969); *Anderson v. Cowger*, 158 Neb. 772, 65 N.W.2d 51 (1954).

In *Guerra v. Iowa Beef Processors, Inc., supra*, this court considered an award to a laborer who, after a work-related

injury, returned to his former employment and earned wages at a rate 48 cents per hour above the rate paid at the time of injury, although Guerra had a 10-percent loss of bodily function from the accident. In upholding the award to Guerra, this court stated:

> The fact that an employer is willing to continue to employ a person whose ability to perform his tasks has been restricted ought not to destroy the employee's rights to compensation benefits.
>
> . . . "[T]he Workmen's Compensation Court was entitled to take into consideration not only the 10 percent loss of bodily function because of the lumbar laminectomy, but also the facts that the plaintiff was engaged in common labor and that that was his primary skill. His ability to lift was impaired and his employability was thus reduced."

Id. at 437, 318 N.W.2d at 889 (quoting from *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980)).

As Professor Larson observes, "It is uniformly held . . . without regard to statutory variations in the phrasing of the test, that a finding of disability may stand even when there is evidence of some actual post-injury earnings equaling or exceeding those received before the accident." 2 A. Larson, The Law of Workmen's Compensation § 57.21(c) at 10-101 (1989) (citing, inter alia, *Guerra v. Iowa Beef Processors, Inc., supra*; *Akins v. Happy Hour, Inc., supra*; *Ludwickson v. Central States Electric Co.*, 142 Neb. 308, 6 N.W.2d 65 (1942)). Thus,

> [i]f an employee, after a work-related injury, receives wages equal to or greater than the wages received before the injury, the wages may be considered in the determination whether an employee has sustained an impairment of earning capacity. *Breland v. Ceco Steel Products Corp.*, 173 Neb. 354, 113 N.W.2d 528 (1962). Cf. *Guerra v. Iowa Beef Processors, Inc.*, 211 Neb. 433, 318 N.W.2d 887 (1982) (earning power is not synonymous with wages).

Heiliger v. Walters & Heiliger Electric, Inc., 236 Neb. 459, 471, 461 N.W.2d 565, 574 (1990).

In Schmid's case, as in *Guerra, supra*, a worker's ability to lift

objects has been impaired by injury and presents a question whether the worker has sustained a reduction in earning power or earning capacity. "Whether a claimant has sustained disability which is total or partial and which is temporary or permanent is a question of fact." *Sherard v. Bethphage Mission, Inc.*, 236 Neb. 900, 912, 464 N.W.2d 343, 351 (1991). Accord *Roan Eagle v. State*, 237 Neb. 961, 468 N.W.2d 382 (1991). Consequently, evidence in Schmid's case is sufficient for the compensation court's finding that Schmid suffered a 20-percent permanent partial disability to the body as a whole, that is, a 20-percent decrease or reduction in earning power or earning capacity. In view of the record and the standard of review for this court, we cannot conclude that the Nebraska Workers' Compensation Court, as the sole judge of witness credibility and the weight to be given a witness' testimony, was clearly erroneous in its finding. Cf. *Roan Eagle v. State, supra.*

Hence, the compensation court's award to Schmid is supported by evidence, is not clearly erroneous, and is, therefore, affirmed.

Because NIR and Custer County have failed to reduce the amount of Schmid's award reviewed in this appeal, we order that the appellants shall pay to Schmid $1,000 to be applied toward the fee of Schmid's lawyer for services in this court. See Neb. Rev. Stat. § 48-125(1) (Reissue 1988) (attorney fee for employee when employer appeals and fails to obtain a reduction of an award to the employee). See, however, *Kraft v. Paul Reed Constr. & Supply*, *ante* p. 257, 263, 475 N.W.2d 513, 517-18 (1991):

> [I]n an appeal of any type of case filed after December 31, 1991, in this court or the Court of Appeals, any party who claims entitlement under the law or a uniform course of practice to an attorney fee shall, at the time of filing his, her, or its brief, also file a separate claim for such fees supported by an affidavit which justifies the amount sought.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. RANDOLPH K. REEVES, APPELLANT.

476 N.W.2d 829

Filed November 8, 1991. No. 88-972.

1. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances.** Nebraska is a "weighing" state and is therefore governed by *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990). A single judge or the three-judge panel determines the aggravating and mitigating circumstances and decides whether to impose the death penalty by determining whether the aggravating circumstances outweigh the mitigating circumstances. Neb. Rev. Stat. §§ 29-2520 and 29-2522 (Reissue 1989).
2. _____: _____: _____. The balancing of aggravating circumstances against mitigating circumstances is not merely a matter of number counting but, rather, requires a careful weighing and examination of the various factors. The procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but, rather, a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.
3. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Proof.** The findings on which an aggravating circumstance is based must be proved beyond a reasonable doubt.
4. **Constitutional Law: Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** In a "weighing" state, when an appellate court invalidates one or more of the aggravating circumstances, or finds as a matter of law that any mitigating circumstance exists not considered by the sentencing panel in its balancing, the appellate court may, consistent with the U.S. Constitution, reweigh the remaining circumstances or conduct a harmless error analysis.
5. **Sentences: Death Penalty: Aggravating and Mitigating Circumstances: Appeal and Error.** The appellate court may consider the entire record of trial and sentencing anew, or may rely on the findings of the sentencing panel, provided the court makes independent findings and reviews all the aggravating and mitigating circumstances.
6. _____: _____: _____: _____. Our review under *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), requires an independent examination of the trial record, the presentence investigation, and the findings of the sentencing panel in order to determine the existence or nonexistence of aggravating and mitigating circumstances, as well as a reweighing of all the factors.
7. **Sentences: Death Penalty: Appeal and Error.** A harmless error analysis is permitted in appellate review of death penalty sentences.
8. **Criminal Law: Trial: Juries: Appeal and Error.** Harmless error exists in a jury trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a

verdict adverse to a substantial right of the defendant.

9. **Constitutional Law: Convictions: Appeal and Error.** An otherwise valid conviction should not be set aside if the reviewing court concludes that the constitutional error was harmless beyond a reasonable doubt.
10. **Homicide: Death Penalty: Aggravating and Mitigating Circumstances.** Aggravating circumstance Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1989) describes two separate disjunctive circumstances which may operate together or independently of one another. The first circumstance is that the murder was especially heinous, atrocious, or cruel. We have said this circumstance includes a pitiless crime which is unnecessarily torturous to the victim and cases where torture, sadism, or the imposition of extreme suffering exists. We have narrowed this class to include murders involving torture, sadism, or sexual abuse.
11. **Homicide: Death Penalty: Aggravating and Mitigating Circumstances: Proof.** The State need only prove the first prong of Neb. Rev. Stat. § 29-2523(1)(d) (Reissue 1989) for that aggravating circumstance to exist.

Appeal from the District Court for Lancaster County, DONALD E. ENDACOTT, Judge, on remand from the Supreme Court of the United States. Affirmed.

John Stevens Berry and Robert B. Creager, of Berry, Anderson, Creager & Wittstruck, P.C., for appellant.

Don Stenberg, Attorney General, and Sharon M. Lindgren for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ., and COLWELL, D.J., Retired.

PER CURIAM.

This case is before us on remand from the U.S. Supreme Court. Randolph K. Reeves' petition for writ of certiorari was granted, and on November 13, 1990, the U.S. Supreme Court vacated our decision in *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990), and remanded the cause to this court for further consideration in light of its decision in *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990).

In 1981, Reeves was convicted of two counts of first degree murder in the 1980 deaths of Janet Mesner and Victoria Lamm. The facts and circumstances of the crimes are laid out in our opinion in *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). He was sentenced by a three-judge panel to death for each murder. The panel found three aggravating circumstances

in regard to the death of Lamm: Neb. Rev. Stat. § 29-2523(1)(b) (Reissue 1989) (the murder was committed in an apparent effort to conceal commission of a crime or to conceal the identity of the perpetrator of a crime), § 29-2523(1)(d) (the murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence), and § 29-2523(1)(e) (at the time the murder was committed, the offender also committed another murder). With regard to the death of Mesner, the panel found to exist aggravating circumstances (1)(d) and (1)(e). The panel found no statutory mitigating circumstances to exist as to either murder, but considered nonstatutory mitigating circumstances presented by Reeves.

On direct appeal, this court affirmed Reeves' convictions and sentences. See *State v. Reeves*, 216 Neb. 206, 344 N.W.2d 433 (1984). However, we invalidated as a matter of law aggravating circumstance (1)(d) as it applied to the murder of Lamm. We also found as a matter of law that mitigating circumstance § 29-2523(2)(g) (at the time of the crime the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication) existed as to both murders.

Reeves filed for postconviction relief, pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1989), and new counsel was appointed. The district court, after granting an evidentiary hearing, dismissed Reeves' motion. On appeal from the district court's decision, we again affirmed Reeves' convictions and sentences. See *State v. Reeves*, 234 Neb. 711, 453 N.W.2d 359 (1990). As stated above, Reeves appealed this decision to the U.S. Supreme Court, which granted his petition for writ of certiorari, vacated our decision, and remanded the cause to us for reconsideration in light of *Clemons*.

THE HOLDING IN *CLEMONS V. MISSISSIPPI*

In *Clemons*, the Court considered the validity of a death sentence affirmed by the Mississippi Supreme Court despite the fact that one of the aggravating factors used by the jury in sentencing was constitutionally invalid in light of the Court's

decision in *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988).

At Clemons' sentencing hearing, the State presented evidence establishing two aggravating factors: (1) that the murder was committed during the course of a robbery for pecuniary gain and (2) that it was an "especially heinous, atrocious or cruel" killing. Clemons presented mitigating evidence from his mother and a psychologist. The jury found that the aggravating circumstances outweighed the mitigating circumstances and opted for the death penalty.

The Mississippi Supreme Court found the *Maynard* case inapplicable and stated that with or without the "especially heinous" aggravating factor, the sentence would have been the same. The court then conducted its proportionality review and affirmed the death sentence.

Clemons claimed violations of his due process and eighth amendment rights. The U.S. Supreme Court rejected Clemons' claim that an appellate court may not uphold a death sentence imposed by a jury that has relied in part on an invalid aggravating factor. The Court stated that the Constitution does not require that a jury impose a death sentence or that the jury specify the aggravating factors permitting imposition of the death sentence.

The Court also rejected Clemons' contention that an appellate court cannot properly reweigh aggravating and mitigating circumstances and, thus, it is a violation of the eighth amendment for an appellate court to attempt to salvage the death penalty in this manner. The Court stated that appellate courts routinely consider whether the evidence supports the jury verdict and can and do make individualized sentencing determinations based on the evidence in each defendant's case. A court undertakes a similar process during a proportionality review. The Court found nothing unfair or unreliable about appellate reweighing of aggravating or mitigating factors, and stated that such weighing could adequately be accomplished without the assistance of written jury findings.

The Court then considered Clemons' claim that the Mississippi court did not actually reweigh the evidence at all. The Court stated that an automatic affirmance, so long as there

remained one aggravating circumstance, was not appellate reweighing and would be invalid because the defendant would not receive individualized treatment. The Court said it was unable to determine from the record whether the Mississippi court did perform an adequate weighing function or merely affirmed the sentence based on the remaining aggravating factors. The Court vacated the judgment and remanded for further proceedings to determine the factors the court did consider in its analysis.

The Court also stated that the Mississippi Supreme Court had the option of conducting a harmless error review as to the sentencing proceeding under the proper "beyond a reasonable doubt" standard of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

The Court made clear that appellate reweighing and harmless error analysis by state courts was not required by *Clemons*, but was within the discretion of the states. *Clemons* teaches only that such procedures are constitutionally permissible and that in some situations state appellate courts might find such analysis difficult and better left to the sentencing court.

In summary, *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), sets forth three options available to appellate courts in death penalty cases where there has been an error concerning the trial court's finding of aggravating and/or mitigating circumstances. First, the court may analyze and reweigh the aggravating and mitigating circumstances itself to determine whether or not the scale tips in favor of the death penalty. Second, the court may conduct a harmless error analysis to determine whether or not error by the district court in finding aggravating or mitigating circumstances has prejudiced the rights of the defendant. Third, the court may remand the cause for a new sentencing hearing.

THE HOLDING IN *PARKER V. DUGGER*

Since *Clemons*, the Supreme Court has commented further on the role of state appellate courts in independently reweighing aggravating and mitigating factors in death penalty cases. In

Parker v. Dugger, ____ U.S. ____, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991), the Court held that the Florida Supreme Court erred in affirming Parker's death sentence because it failed to consider evidence of nonstatutory mitigating circumstances. In Parker's case, the Court found that the Florida trial judge relied on nonstatutory mitigating factors in his sentencing determination, but did not specifically enumerate them in his written findings. The Florida Supreme Court affirmed the sentence based on the findings of the trial judge and found no mitigating circumstances to exist. The Florida court did not rely on what the trial judge actually found (evidence of nonstatutory mitigating factors that were not explicit in the sentencing record) and thus affirmed Parker's death sentence without considering all mitigating circumstances. This affirmance was invalid because it deprived Parker of an individualized sentencing determination.

The Court stated that under *Clemons* it is permissible for a state appellate court to reweigh aggravating and mitigating factors, but such reweighing must be done independently. The court must achieve, in its review of the case, an individualized determination of the sentence based on the defendant's character and the circumstances of the crime. The Florida Supreme Court's decision was not arrived at independently, since the court made no review of the individual record in Parker's case and did not rely on the actual findings of the trial judge. Although the Court ordered the Florida Supreme Court, on remand, to reconsider Parker's sentence in light of the entire trial record and sentencing hearing, the Court stated elsewhere in the opinion that a meaningful appellate review does not require the state court to consider the defendant's actual record in all circumstances. In this case, however, an individualized determination could have been achieved only if the Florida court had conducted its own examination of the trial and sentencing records.

THE DEATH PENALTY IN NEBRASKA AFTER *CLEMONS*

This court has decided four death penalty cases since *Clemons*: *State v. Joubert*, 235 Neb. 230, 455 N.W.2d 117

(1990) (postconviction); *Anderson v. Gunter*, 235 Neb. 560, 456 N.W.2d 286 (1990) (habeas corpus); *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990) (direct appeal); and *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991) (second postconviction). *Joubert* does not discuss error in the finding of aggravating and mitigating circumstances, and *Anderson* concerns only the "Right to Bear Arms" amendment to the Nebraska Constitution.

In *Victor*, the defendant assigned as error the sentencing court's findings of aggravating circumstances (1)(a) and (1)(d) and the failure to find mitigating circumstance (2)(g), as well as the constitutionality of (1)(d) (the "heinous, atrocious, cruel" circumstance). We affirmed the judgment of the district court as to all its findings. We also determined that the first prong of (1)(d) was constitutional as limited to murders involving torture, sadism, or sexual abuse. We did not specifically refer to *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990), anywhere in the opinion, but did conduct an independent reweighing of the aggravating and mitigating factors on appeal. We stated:

> Having weighed anew the aggravating circumstances and the mitigating circumstances . . . we conclude that, even excluding defendant's manslaughter conviction and giving full weight to Victor's conduct during previous incarcerations, the aggravating circumstances . . . so far outweigh the mitigating circumstance that the imposition of the death penalty was appropriate and not arbitrary.

Victor, supra at 795, 457 N.W.2d at 447. As is our procedure in reviewing a direct appeal of any death penalty case, our review included an examination of the entire trial record, as well as the findings of the sentencing panel. Our independent reweighing of the aggravating and mitigating circumstances was based upon our own review of the record, as well as the conclusions of the three-judge panel.

In *Otey*, the defendant assigned as error the sentencing panel's finding of aggravating circumstance (1)(d), the panel's failure to find any mitigating circumstances, and the decision of the panel to impose the death penalty. In that opinion, we specifically referred to *Clemons*, and summarily adopted the

reweighing rule, "[c]ompletely disregarding the New Jersey charges and weighing anew the aggravating and mitigating circumstances in this case, as permitted by *Clemons v. Mississippi* . . . ." *Otey, supra* at 927, 464 N.W.2d at 361. We relied on the findings of the sentencing panel in reweighing the aggravating and mitigating circumstances when affirming Otey's death sentence on this second postconviction claim. We had originally verified these findings through an independent review of the entire record in Otey's direct appeal.

Nebraska is a "weighing" state and is therefore governed by *Clemons*. A singe judge or a three-judge panel determines the aggravating and mitigating circumstances and decides whether to impose the death penalty by determining whether the aggravating circumstances outweigh the mitigating circumstances. See Neb. Rev. Stat. §§ 29-2520 and 29-2522 (Reissue 1989). In conducting the balancing of aggravating and mitigating factors, we are guided by our analysis in *Victor, supra* at 794-95, 457 N.W.2d at 447:

> The balancing of aggravating circumstances against mitigating circumstances is not merely a matter of number counting but, rather, requires a careful weighing and examination of the various factors. *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989); *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986). As we observed in *State v. Stewart*, 197 Neb. 497, 518, 250 N.W.2d 849, 862 (1977), quoting *State v. Dixon*, 283 So. 2d 1 (Fla. 1973):
> " 'It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. . . .' "

The findings on which an aggravating circumstance is based must be proved beyond a reasonable doubt. *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977); *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986).

In a weighing state, when an appellate court invalidates one

or more of the aggravating circumstances, or finds as a matter of law that any mitigating circumstance exists not considered by the sentencing panel in its balancing, the appellate court may, consistent with the U.S. Constitution, reweigh the remaining circumstances or conduct a harmless error analysis. *Clemons v. Mississippi*, 494 U.S. 738, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990). Under *Parker v. Dugger*, ____ U.S. ____, 111 S. Ct. 731, 112 L. Ed. 2d 812 (1991), the appellate court may consider the entire record at trial and sentencing anew, or may rely on the findings of the sentencing panel, provided the court makes independent findings and reviews all the aggravating and mitigating circumstances.

We apply the rule in *Clemons* and independently consider the circumstances of Reeves' case, rather than remand for a new sentencing hearing. We henceforth require our review under *Clemons* to include an independent examination of the trial record, the presentence investigation, and the findings of the sentencing panel in order to determine the existence or nonexistence of aggravating and mitigating circumstances, as well as a reweighing of all the factors. See *Parker, supra*. We find this to be the most effective way in which to ensure individualized and fair determination of the propriety of the death sentence in each defendant's case. We do not find this holding at odds with our previous decision in *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991), where we reviewed only the findings of the sentencing panel. It is clear from the holding in *Parker* that reliance on the sentencing panel's findings is permissible, so long as the defendant is given individual treatment. Reliance on the panel's findings was particularly trustworthy in Otey's case, since we had conducted a complete review of the entire trial record during his direct appeal. We do not question those findings now and find our reliance upon them in keeping with the role of an appellate court in assessing the individual circumstances of each defendant's case.

HARMLESS ERROR ANALYSIS

We must first determine if the sentencing panel's actions constituted harmless error. *Clemons* permits a harmless error analysis in appellate review of death penalty sentences.

" 'Harmless error exists in a jury trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant.' " *State v. Plant*, 236 Neb. 317, 343, 461 N.W.2d 253, 272 (1990) (Shanahan, J., concurring in the result). Accord *State v. Watkins*, 227 Neb. 677, 419 N.W.2d 660 (1988). See, also, *United States v. McCrady*, 774 F.2d 868 (8th Cir. 1985). In *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), the U.S. Supreme Court held that an otherwise valid conviction should not be set aside if the reviewing court concludes that the constitutional error was harmless beyond a reasonable doubt. We have repeatedly followed the "beyond a reasonable doubt" test set forth in *Chapman*. See, *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989); *State v. Sims*, 213 Neb. 708, 331 N.W.2d 255 (1983).

In this case, we are concerned with the error of the three-judge panel in failing to consider Reeves' intoxication as a mitigating factor. As stated above, in Reeves' direct appeal we found that mitigating circumstance (2)(g) existed as a matter of law.

We do not consider the error of the district court harmless beyond a reasonable doubt. We are unable to determine that the weighing analysis in the minds of the three-judge panel would have been the same if mitigating circumstance (2)(g) had been factored into the balance. We do not know what weight the judges may have given this circumstance if they had found it to exist. Therefore, we find it necessary to independently reweigh all the aggravating and mitigating circumstances to determine if the death penalty was an appropriate sentence in this case.

REWEIGHING THE AGGRAVATING AND MITIGATING CIRCUMSTANCES

To review, the three-judge panel found aggravating circumstances (1)(d) and (1)(e) to exist with regard to the death of Mesner. In regard to the death of Lamm, the panel found aggravating circumstances (1)(b), (1)(d), and (1)(e) to exist. The panel found no mitigating circumstances to exist as to either murder. However, in Reeves' direct appeal this court

invalidated aggravating circumstance (1)(d) as to the murder of Lamm and found as a matter of law that mitigating circumstance (2)(g) existed as to both murders.

The three-judge panel based its finding of aggravating circumstance (1)(d) as to Mesner's murder on the conclusion that Mesner had been brutally stabbed and sexually abused by Reeves. The panel found that Reeves went to Mesner's home with the intent of having sexual relations with her, broke into the house, proceeded to forcibly attack her, stabbed her repeatedly, and had, or attempted to have, sexual relations with her. Mesner's death did not occur until several hours after the assault, during which time she suffered both physical and mental anguish.

As to the death of Lamm, the panel found that circumstance (1)(b) existed after determining that Lamm walked into Mesner's bedroom while Reeves was sexually assaulting Mesner and was killed to conceal Reeves' identity. The panel also concluded that (1)(d) applied to Lamm's murder, mentioning only that there were no "defense cuts" on Lamm's body or any evidence that she was able to resist the attack. The panel concluded from this evidence that Lamm's murder was callous, coldblooded, and malicious.

The panel also found that (1)(e) existed as to both murders based on evidence that the murders of Mesner and Lamm occurred at about the same time.

In our opinion in Reeves' direct appeal, we concluded that the sentencing panel was incorrect in finding that aggravating circumstance (1)(d) existed as to Lamm's murder. We found, based on evidence that no defense cuts were found on Lamm's body, that she was killed swiftly when she walked in on Reeves' assault on Mesner. We also determined that mitigating circumstance (2)(g) existed based on considerable evidence that on the day of the murder Reeves had consumed a large amount of alcohol, as well as two or three buttons of peyote, a hallucinatory drug. The State also conceded on two occasions that (2)(g) existed.

THE MURDER OF JANET MESNER

We begin by analyzing the record as it pertains to the finding

of aggravating and mitigating circumstances in the murder of Mesner. A review of the aggravating and mitigating circumstances set forth in § 29-2523 is necessary.

(1) Aggravating Circumstances:

(a) The offender was previously convicted of another murder or a crime involving the use or threat of violence to the person, or has a substantial history of serious assaultive or terrorizing criminal activity;

(b) The murder was committed in an apparent effort to conceal the commission of a crime, or to conceal the identity of the perpetrator of a crime;

(c) The murder was committed for hire, or for pecuniary gain, or the defendant hired another to commit the murder for the defendant;

(d) The murder was especially heinous, atrocious, cruel, or manifested exceptional depravity by ordinary standards of morality and intelligence;

(e) At the time the murder was committed, the offender also committed another murder;

(f) The offender knowingly created a great risk of death to at least several persons;

(g) The victim was a law enforcement officer or a public servant having custody of the offender or another; or

(h) The crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws.

(2) Mitigating Circumstances:

(a) The offender has no significant history of prior criminal activity;

(b) The offender acted under unusual pressures or influences or under the domination of another person;

(c) The crime was committed while the offender was under the influence of extreme mental or emotional disturbance;

(d) The age of the defendant at the time of the crime;

(e) The offender was an accomplice in the crime committed by another person and his participation was relatively minor;

(f) The victim was a participant in the defendant's

conduct or consented to the act; or

(g) At the time of the crime, the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental illness, mental defect, or intoxication.

Aggravating circumstance (1)(a) is not applicable to the murder of Mesner. Reeves had not previously been convicted of murder or any violent crime. Circumstance (1)(b) is also not applicable. Reeves made no attempt to conceal the murder of Mesner or to conceal his identity. On the contrary, he appeared to do everything possible to implicate himself in the murder by leaving his billfold, underwear, a sock, and the murder weapon at the scene, as well as walking away from Mesner's house on public roadways with his clothes covered with blood and his trousers unzipped. This circumstance is not applicable.

Aggravating circumstance (1)(c) is also not applicable. There is no evidence anywhere in the record that Reeves murdered Mesner for hire.

We do find circumstance (1)(d) applicable to this case. As we have stated before, (1)(d) describes two separate disjunctive circumstances which may operate together or independently of one another. *State v. Otey*, 236 Neb. 915, 464 N.W.2d 352 (1991); *State v. Moore*, 210 Neb. 457, 316 N.W.2d 33 (1982). The first circumstance is that the murder was especially heinous, atrocious, or cruel. We have said this circumstance includes a " 'pitiless crime which is unnecessarily torturous to the victim' and . . . cases where torture, sadism, or the imposition of extreme suffering exists." *Moore, supra* at 470, 316 N.W.2d at 41. We have narrowed this class to include murders involving torture, sadism, or sexual abuse. *State v. Rust*, 197 Neb. 528, 250 N.W.2d 867 (1977). In *State v. Victor*, 235 Neb. 770, 457 N.W.2d 431 (1990), we determined that this narrow construction of the first prong of (1)(d) comports with United States constitutional requirements and does not lead to arbitrary results. See *Harper v. Grammer*, 895 F.2d 473 (8th Cir. 1990). The State need only prove the first prong of (1)(d) for that aggravating circumstance to exist. *Otey, supra*. See *Victor, supra*.

We find from the evidence that Reeves' murder of Mesner involved at least the attempt to sexually assault her. Prior to her death, Mesner told police that Reeves raped her. Although laboratory tests were unable to determine the presence of spermatozoa in Mesner's vagina, semen of Reeves' blood type was detected on the underwear he left at the scene. One of Reeves' only recollections concerning the murders is that of raping and stabbing Mesner.

Besides the sexual assault or attempted sexual assault of Mesner, Reeves brutally stabbed her seven times in the chest area. It is unclear from the record whether the stabbing took place prior to or after the sexual assault, but the condition of the south bedroom of the house evidenced a violent struggle. Furniture was overturned, blood covered the floor, and the telephone had been ripped from the wall. It was obvious that Mesner struggled with Reeves during his attack upon her. After Reeves had stabbed both Mesner and Lamm and left the premises, Mesner managed to get downstairs and call 911 from the telephone on the first floor. When police officers and firemen arrived at the home, they found Mesner lying on the floor on the landing at the top of the stairs at the rear of the house, still alive and able to identify her attacker. She died approximately 4 hours after the attack while on the operating table at Lincoln General Hospital.

We find the first prong of (1)(d) to exist beyond a reasonable doubt. Mesner endured tremendous physical pain and suffering following Reeves' brutal attack upon her. A firefighter present at her home and a police officer in the emergency room where she was treated prior to her death testified that Mesner stated several times that she was in pain. She survived, despite her condition, for several hours following the attack, during which time she was forced to go downstairs to the only remaining telephone to summon help. Reeves' brutal assault upon Mesner was indeed pitiless and totally without provocation. He left her to die in her own home. We find that prong (1)(d) has been satisfied.

Reeves' rape or attempted rape and stabbing murder of Mesner was particularly unsettling because of his prior relationship with Mesner. She was a distant relative of Reeves.

He had known her all his life. He had been a guest in her home and had socialized with her on many occasions. He admitted that he was on friendly terms with her and that they had never had any type of romantic relationship. We conclude that aggravating circumstance (1)(d) exists beyond a reasonable doubt.

Aggravating circumstance (1)(e) also exists beyond a reasonable doubt. It is obvious from the evidence that Mesner and Lamm were killed at about the same time on March 29, 1980.

We do not find circumstance (1)(f) to exist. There is no evidence in the record to show that Reeves' actions on the night of March 29 created a risk of harm to any other persons aside from the victims. Lamm's daughter was present in the house at the time of the killings, but there is no evidence that she was aware of Reeves' attacks on her mother or Mesner or that he tried to harm her in any way. Reeves did not know the young girl was in the house.

Furthermore, (1)(g) also does not exist. Mesner was not a public servant or a law enforcement officer. Neither was the crime committed to disrupt or hinder the exercise of any governmental function, eliminating circumstance (1)(h).

We now turn to the mitigating factors outlined in § 29-2523. We do not find (2)(a) to exist in this case. After a review of the presentence investigation report, which includes Reeves' "rap sheet," we find that Reeves has a history of criminal offenses, including arrests and convictions for marijuana possession, insufficient-fund checks, and disturbing the peace. These offenses, while rather petty and nonviolent in nature, nonetheless constitute a history of criminal activity. The language of the statute does not require past criminal acts to be violent or even that convictions result to prevent a finding of circumstance (2)(a). Any history of violent criminal behavior would likely be counted in aggravating circumstance (2)(a) if a conviction resulted. Reeves' criminal history prevents a finding of mitigating circumstance (2)(a).

We also do not find circumstance (2)(b) to exist. There is no evidence that Reeves acted under the influence of any other party at the time he committed the murders. Likewise,

circumstance (2)(c) does not exist. An expert witness at trial testified that Reeves suffered from a serious emotional problem. The vast majority of other psychiatric and psychological testimony supports our conclusion that apart from his impairment due to drug and alcohol consumption, Reeves was sane and mentally competent on the night of the murders.

We do not find Reeves' age to be a mitigating factor. At the time of the murders he was 24 years old, well past the age of majority. He was financially independent of his parents and living on his own. Circumstance (2)(d) does not exist. Circumstances (2)(e) and (2)(f) also do not exist. Reeves' participation in the murders of Mesner and Lamm was singular. He was not an accomplice, but committed the acts on his own. Likewise, Mesner did not participate in Reeves' acts and certainly did not consent to being raped or murdered.

We do, however, find circumstance (2)(g) to exist. The record is replete with evidence of Reeves' alcohol and drug consumption prior to the murders. Reeves stated that he had been drinking since approximately 8 a.m. the morning prior to the murders and had consumed peyote mixed with orange juice at a party that evening. Two blood alcohol tests administered to Reeves after his arrest showed his blood alcohol level to be .149 at approximately 6 a.m. the next morning and .095 approximately 2 hours later. One expert witness testified that based on his calculation of Reeves' metabolism of alcohol, Reeves' blood alcohol level could have been .20 or greater at the time of the murders. Evidence of mescaline, found in the drug peyote, was also found in Reeves' urine. While the testimony was in conflict over whether Reeves' mixture of alcohol and peyote affected his ability to form the requisite intent for a sexual assault, at the very least his judgment or reasoning was impaired at the time of the murders. This is evident from the fact that he left his billfold, underwear, and a sock at the crime scene, and made no effort to hide or conceal himself after the murders. Rather, he was found walking down a public street with his pants unzipped and blood covering his clothing. The State conceded this circumstance during the sentencing hearing, and we find it to exist.

THE MURDER OF VICTORIA LAMM

We now consider the various aggravating and mitigating circumstances in regard to the murder of Lamm. We have already discussed aggravating circumstance (1)(a) above, and find that it does not exist as to Lamm's murder either.

However, we do find circumstance (1)(b) to exist as to the murder of Lamm. Apparently Lamm, who was sleeping in another room in the house, heard Reeves attack Mesner and went to Mesner's room to investigate. She evidently surprised Reeves during his assault upon Mesner, causing him to stab her to death. Reeves admitted that he did not know Lamm and did not know she was in the house when he went there. He cannot remember killing her. We can offer no explanation for the murder of Lamm other than that Reeves wanted to prevent Lamm from identifying him. If he was intent on continuing with his assault of Mesner despite Lamm's presence, he could have tied Lamm up or knocked her unconscious. Reeves was 6 feet tall and weighed approximately 200 pounds. Lamm was 5 feet 8 inches tall and weighed approximately 125 pounds. Clearly he could have overpowered her. Lamm posed no threat to Reeves except as a witness to his assault upon Mesner. We find circumstance (1)(b) to exist beyond a reasonable doubt.

As in Mesner's murder, we find no evidence that Reeves murdered Lamm for hire. Circumstance (1)(c) does not exist.

We agree with our original determination in Reeves' direct appeal and do not find circumstance (1)(d) to exist as to the murder of Lamm. Lamm's body did not evidence any defense cuts or show any other signs of resistance or struggle. Her death was caused by a stab wound that penetrated the major blood vessel leading to her heart. Dr. Harlan L. Papenfuss, who performed the autopsy on Lamm's body, testified that Lamm would have been rendered unconscious within a few seconds after sustaining this fatal wound and her death would have occurred within 10 minutes. Lamm did not endure prolonged suffering, nor was she tortured. Therefore, we do not find that her murder falls within circumstance (1)(d).

As we have discussed above, Lamm was killed at about the same time as Mesner. Circumstance (1)(e) exists beyond a reasonable doubt. Also, as in Mesner's case, circumstances

(1)(f), (1)(g), and (1)(h) are not applicable to Lamm's murder.

We need not discuss each mitigating circumstance individually as it relates to Lamm's murder, as Reeves' criminal history, age, participation in the murders, and mental condition were the same as to both murders. We reiterate again that we find mitigating circumstance (2)(g) to exist as to the murder of Lamm based on our above discussion of Reeves' alcohol and drug consumption leading up to the night of the murders.

NONSTATUTORY MITIGATING CIRCUMSTANCES

We now turn to the nonstatutory mitigating factors present in this case. In the sentencing hearing and at trial, Reeves raised several issues in mitigation of his possible death sentence. During the defense's case, several witnesses testified to Reeves' nonviolent nature and described him as a passive person. In the presentence investigation report, various statements from Reeves' family members and acquaintances indicated that the commission of any violent act would be totally out of character for Reeves. During the sentencing hearing, evidence of Reeves' remorse for the killings was also submitted. Reeves' amnesia concerning most of the events of March 29, 1980, was also confirmed by several of the psychiatrists and psychologists who testified. The sentencing panel did not specifically address any of these factors except to note that the court had received many letters from interested parties urging the panel not to impose the death penalty upon Reeves.

CONCLUSION

We have balanced the aggravating and mitigating factors anew and have determined that the aggravating circumstances outweigh any statutory or nonstatutory mitigating circumstances in this case. Reeves' murders of Mesner and Lamm were senseless and brutal, made more so by the fact that he was a relative and friend of Mesner's. The fact that he stabbed to death two women and sexually assaulted or attempted to sexually assault one of them for no apparent reason is not mitigated by his intoxication on the night of the murders. Reeves was found to be sane at the time of the murders. His impairment by drug and alcohol use did not diminish his capacity to intentionally locate and break into

Mesner's house, sexually assault or attempt to sexually assault her, stab her, and then stab her houseguest to death. We do not consider Reeves' remorse, amnesia, usual nonviolent nature, or intoxication sufficient to excuse him from the death penalty. Sentences of death remain the appropriate penalties for Reeves.

AFFIRMED.

MARVIN HAMMOND, APPELLANT, V. CITY OF BROKEN BOW, APPELLEE.

476 N.W.2d 822

Filed November 8, 1991. No. 89-457.

1. **Actions: Employment Contracts: Appeal and Error.** A suit under an employment contract is an action at law, and this court will overturn factual findings of the trial court only if they are clearly wrong.
2. **Statutes: Ordinances: Legislature: Intent.** Repeals by implication are not favored and will not be found unless the intent of the legislative body makes another construction of the two statutes or ordinances in question untenable.
3. **Statutes: Ordinances.** Repeal by implication requires that the later statute or ordinance be unavoidably repugnant to the earlier statute or ordinance.
4. **Ordinances: Wages: Intent.** An appropriation ordinance which contains no words expressly amending or repealing a salary ordinance, nor any words implying an intent to do so, does not repeal an earlier salary ordinance.
5. **Pleadings: Appeal and Error.** Where a particular theory of the case is not stated in a plaintiff's petition, he or she cannot raise it for the first time on appeal.
6. **Municipal Corporations: Claims: Notice.** The purpose of a municipality claims statute is to ensure that the municipal governing body has proper notice of claims against the municipality.
7. **Pleadings: Demurrer: Waiver: Appeal and Error.** Filing an amended petition after a successful demurrer waives error in the sustaining of the demurrer.

Appeal from the District Court for Custer County: RONALD D. OLBERDING, Judge. Reversed and remanded for further proceedings.

Steven O. Stumpff, of Stumpff Law Office, for appellant.

Jerry L. Pigsley, of Heron, Burchette, Ruckert & Rothwell, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

This is an appeal by the plaintiff, Marvin Hammond, from a judgment entered in his favor and against the defendant, City of Broken Bow, following a bench trial. The plaintiff originally sought damages in excess of $10,000 for back wages. The trial court awarded him damages in the amount of $818.80, setting off $97.50 in costs, as the judgment was less than the defendant's earlier offer of judgment. Broken Bow does not cross-appeal.

A suit under an employment contract is an action at law, and this court will overturn factual findings of the trial court only if they are clearly wrong. *Brown v. Clayton Brokerage Co.*, 238 Neb. 646, 472 N.W.2d 381 (1991).

Hammond was originally hired by Broken Bow on August 16, 1974. He worked in Broken Bow's powerplant until April 1, 1981, when he was transferred to the city's water department. Hammond was transferred because of three incidents of damage to powerplant equipment resulting from his failure to properly operate it. Hammond was transferred back to the powerplant on April 15, 1986.

Since 1979, Broken Bow has employed a military-style pay scale system. This system is embodied in two ordinances, one entitled "Pay Levels for City Employees" (pay-level ordinance) and the other entitled "Hourly and Per Annum Rates and Steps" (rates-and-steps ordinance). These ordinances were enacted in 1979, in conjunction with the city's 1979-80 appropriation ordinance.

The ordinances set out seven pay grades, designated BBS 3 through BBS 9. Each of the pay grades is subdivided into 10 numbered levels. The pay-level ordinance establishes a range of pay grades and levels for each of a variety of positions. The pay-level ordinance provides pay levels for powerplant operators ranging from grade BBS 7, level 1 (BBS 7-1), to BBS 7-10, and for water department workers from BBS 5-1 to BBS 6-10. The copy of that ordinance received in evidence contained a handwritten notation, "Power Plant Assistant starting at

BBS6 level 1 to BBS6 level 4." Apparently, the board of public works added this classification and passed a motion to recommend it to the city council, which recommendation might have affected the amount of Hammond's entitlement. However, it was never submitted to the city council and consequently was never adopted. The rates-and-steps ordinance sets an hourly wage for each pay grade and level, and provides a schedule of intervals at which an employee will be eligible for salary review.

In addition to the pay-level and rates-and-steps ordinances, Broken Bow passed appropriation ordinances yearly between 1980 and 1988. Each appropriation ordinance from 1982 forward authorized pay levels and wages for each Broken Bow employee in a section headed "Pay Increases to Officials and Employees." The 1986-87 appropriation ordinance was passed on August 19, 1986. The "Pay Increases to Officials and Employees" section of this ordinance authorizes a powerplant operator position to be paid at "BBS5-Level 3 $5.98." Neither this nor any of the appropriation ordinances contain any explicit language repealing any former ordinance, nor do any contain any sections remotely resembling the pay-level or rates-and-steps ordinances.

Upon Hammond's transfer to the water department, he was demoted from BBS 7-7 to BBS 4-4. Hammond agreed to that pay reduction. Broken Bow twice upgraded Hammond's classification while he worked at the water department, to BBS 4-5 on August 1, 1981, and to BBS 5-3 on January 1, 1982. The city did not upgrade Hammond's classification again until January 1, 1987, when he was promoted to BBS 5-4.

Hammond met with the board of public works on November 23, 1987, to formally complain about various wage claims against Broken Bow. The board denied the claims on January 11, 1988. Hammond filed a claim with the Broken Bow City Council March 22, 1988.

Hammond initiated this case on January 25, 1988, making essentially two claims for backpay. The first claim was based upon Broken Bow's alleged misclassification of Hammond at pay grades and levels lower than those authorized by the pay-level ordinance. Essentially, Hammond alleged he was

entitled to minimum pay levels of BBS 5-1 during his tenure at the water department and BBS 7-1 following his return to the powerplant. The second claim was based upon Broken Bow's failure to promote Hammond through the various pay levels at the intervals indicated in the rates-and-steps ordinance. Hammond claimed such "wage level increase[s]" were mandatory. He sought damages, costs, attorney fees, and a grant to schools equal in amount to the damages awarded.

Hammond's petition claimed this relief under the Nebraska Wage Payment and Collection Act (NWPCA). See Neb. Rev. Stat. §§ 48-1228 et seq. (Reissue 1984). Upon Broken Bow's motion, the district court struck the portion of Hammond's petition including any claims for relief based on the NWPCA on the grounds that the NWPCA does not apply to political subdivisions. The district court also struck his claim for costs on the grounds that the petition did not plead compliance with Neb. Rev. Stat. § 17-714 (Reissue 1987).

Hammond filed an amended petition on March 21, 1988, alleging that he presented a claim to the Broken Bow City Council on March 18, 1988. The amended petition did not plead the NWPCA and sought damages and costs. The district court struck the allegations regarding presentment of the claim to the city council, ruling that the facts alleged occurred after the filing of the petition and therefore should have been raised by supplemental pleadings pursuant to Neb. Rev. Stat. § 25-856 (Reissue 1989).

After the district court granted Hammond's motion to supplement the pleadings, he filed his second amended petition on June 23, 1988. Hammond repeated his allegation that he presented a claim to the Broken Bow City Council on March 18, 1988, and claimed damages, an adjustment to his retirement benefits and Social Security earnings, interest, and costs. The second amended petition did not plead the NWPCA.

Following a trial on the second amended petition, the district court, on March 27, 1989, entered judgment and issued written findings. The court held that Broken Bow misclassified Hammond as BBS 5-3 and later BBS 5-4 after his return to the powerplant, when the pay-level ordinance mandated a minimum of BBS 7-1 for Hammond's position. The court

limited this recovery to the period between Hammond's return to the powerplant and the enactment of the 1986-87 appropriation ordinance, which the court held amended the pay-level ordinance by implication to authorize a BBS 5-3 level for powerplant operators. The court also ruled that Hammond was misclassified between April 1, 1981, and January 1, 1982, at the water department, but that this claim was barred by the statute of limitations, "even assuming a written contract." The court denied Hammond recovery for wage increases during his tenure at the water department, ruling that these increases were merit-based, not mandatory. The court awarded Hammond costs for the period after he filed his claim with the city council. The court denied Hammond interest on the grounds that the claim was unliquidated.

Hammond's motion for new trial was overruled, and he has brought this appeal.

The plaintiff assigns as error that (1) the trial court erred in ruling that the 1986-87 appropriation ordinance repealed the pay-level ordinance by implication; (2) the court erred in denying damages for periodic wage-level increases; (3) the court erred in applying the statute of limitations for written contract actions; (4) the court erred in denying costs for the period prior to Hammond's filing of a claim with the city council, pursuant to § 17-714; (5) the court erred in denying prejudgment interest; and (6) the court erred in ruling the NWPCA inapplicable to political subdivisions.

The trial court denied Hammond damages for lost wages after the passage of the 1986-87 appropriation ordinance on the theory that such ordinance repealed the pay-level ordinance by implication.

A city of the second class, such as Broken Bow, can repeal an ordinance only by enacting a later ordinance which contains the entire text, as amended, of the earlier ordinance or section being amended, along with a statement that the earlier version is repealed. See Neb. Rev. Stat. § 17-614 (Reissue 1987) ("no ordinance or section thereof shall be revised or amended unless the new ordinance contains the entire ordinance or section as revised or amended"). The "Pay Increases to Officials and Employees" section of the 1986-87 appropriation ordinance

does not establish any pay ranges for particular positions, as does the pay-level ordinance, nor does it provide wage rates and salary review intervals, as does the rates-and-steps ordinance. The appropriation ordinance contains no reference, to either the pay-level or rates-and-steps ordinance, stating that either earlier ordinance is repealed. Any repeal of the two earlier ordinances effected by the 1986-87 appropriation ordinance must be implicit, since the appropriation ordinance does not conform to § 17-614.

Repeals by implication are not favored and will not be found unless the intent of the legislative body makes another construction of the two statutes or ordinances in question untenable. *Nebraska Equal Opp. Comm. v. State Emp. Retirement Sys.*, 238 Neb. 470, 471 N.W.2d 398 (1991). Repeal by implication requires that the later statute or ordinance be unavoidably repugnant to the earlier statute or ordinance. *Id.* Therefore, in order to find a repeal by implication in this case, this court must find that the intent of the Broken Bow City Council in enacting the 1986-87 appropriation ordinance was to create a pay system, the basic tenets of which are unavoidably repugnant to the existing system embodied in the pay-level and rates-and-steps ordinances.

The most obvious intent of the 1986-87 appropriation ordinance is to appropriate funds for the operation of Broken Bow's municipal government for that fiscal year. The ordinance is headed "City of Broken Bow, Nebraska[,] Ordinance No. 771 *Annual Appropriation Bill* 1986-87." (Emphasis supplied.) The preamble characterizes it as "[a]n ordinance to appropriate the sums of money deemed necessary to defray all the necessary expenses and liabilities of the City of Broken Bow, Nebraska," and nowhere mentions an intent to create a comprehensive pay scale or to repeal any earlier ordinance. The character of the ordinance is further made evident by repeated references on its face to the fiscal period beginning on August 1, 1986, and ending on July 31, 1987.

Moreover, the context in which the 1986-87 appropriation bill was enacted indicated that it was never intended to repeal the pay-level and rates-and-steps ordinances. The pay-level and rates-and-steps ordinances were enacted along with the 1979-80

appropriation ordinance. After that time, Broken Bow enacted no less than nine appropriation ordinances, none of which—the 1986-87 ordinance included—provided in any way for a new pay scheme or for the explicit repeal of the old one. The temporal limitation to the current fiscal year inherent in each appropriation ordinance, and the city council's failure to include in each appropriation ordinance the pay-scale information that the pay-level and rates-and-steps ordinances contain, combine to indicate that the pay-level and rates-and-steps ordinances were intended to be permanent, with the funds to be paid out thereunder provided by annual appropriation.

It seems to be Broken Bow's argument that in enacting the 1986-87 appropriation ordinance, the city intended to abolish starting salary guidelines for all positions, maximum salary guidelines for all positions, and all merit- or seniority-based salary increases—and all without ever once expressing an explicit intent to do so. This position is contradicted by the testimony of several city officials at trial. Both the city clerk and the utility superintendent described in detail Broken Bow's procedure for salary review and advancement, using the system established by the rates-and-steps ordinance. The mayor testified that the pay-level ordinance was followed by the city in paying its employees. He also described a system for salary review and advancement substantially identical to that established by the rates-and-steps ordinance. The testimony of these officials leads to the conclusion that if Broken Bow ever intended that the 1986-87 appropriation ordinance establish a comprehensive pay system superseding the one embodied in the pay-level and rates-and-steps ordinances, this intent never manifested itself until the appellate stage of this litigation.

While this court has never faced this particular question before, a reading of similar cases from other jurisdictions is helpful. In *United States v. Langston*, 118 U.S. 389, 6 S. Ct. 1185, 30 L. Ed. 164 (1886), Langston, the U.S. Minister to Haiti, sued the government for backpay. A statute set the salary for the Minister to Haiti at $7,500 per year. Later appropriations bills granted only $5,000 per year to pay the position. The court refused to find that the appropriation

legislation had repealed by implication the earlier statute setting a salary of $7,500 and upheld Langston's recovery where the appropriation bills "contained no words that expressly or by clear implication modified or repealed the previous law." 118 U.S. at 394. Accord, *Coleman v. Kansas City*, 348 Mo. 916, 924, 156 S.W.2d 644, 647 (1941) (an "appropriation ordinance [which] contained no words expressly amending or repealing the salary ordinance, nor . . . any words implying an intent to do so," did not repeal an earlier salary ordinance); *American Fed. of Gov. Emp., AFL-CIO v. Campbell*, 659 F.2d 157 (D.C. Cir. 1980) (distinguished from *Langston* on the basis that the appropriation bill in question there specifically referred to and limited earlier legislation setting salaries).

In light of the record as a whole, the general disfavor of repeal by implication, and the legislative command that municipalities make repeals of ordinances explicit, see § 17-614, the proper construction of the 1986-87 appropriation ordinance is solely as appropriation legislation, intended to leave the pay-level and rates-and-steps ordinances intact.

The trial court erred in holding that the appropriation ordinance repealed the pay-scheme ordinances by implication and in limiting Hammond's recovery on that basis.

Regarding the denial of periodic wage increases, Hammond claimed in his second amended petition that he was entitled to automatic wage-level increases every 6 months, both while at the water department and after his return to the powerplant. The trial court held that the evidence showed that pay increases available under the rates-and-steps ordinance were merit-based and not automatic.

On appeal, Hammond does not dispute this ruling. Rather, he now claims that he was denied periodic *review* for salary increases. However, nowhere in Hammond's second amended petition is it either stated or implied that his theory of recovery is based upon mandatory periodic salary review. Rather, that petition refers to Hammond's entitlement to wage increases. Furthermore, the damages calculation attached to the second amended petition bases its tallies upon "automatic 6-month raise[s]." Where a particular theory of the case is not stated in a plaintiff's petition, he or she cannot raise it for the first time on

appeal. *Foltz v. Northwestern Bell Tel. Co.*, 221 Neb. 201, 376 N.W.2d 301 (1985).

After changing his theory of recovery from automatic salary *increases* to automatic salary *review*, Hammond now argues that Broken Bow could conclusively have shown proper periodic salary review by presenting the testimony of the person who conducted these reviews. However, nothing in Hammond's petition put Broken Bow on notice that such testimony would be necessary. The city would have been completely justified in going to trial prepared only to defend against the theory that Hammond was entitled to automatic pay increases, since that is the only theory he pled. He cannot now be permitted to change that theory.

In his third assignment of error, Hammond claims the district court denied recovery for wages lost before January 25, 1983, 5 years before Hammond filed his petition, because of the statute of limitations. That is a misinterpretation of the court's ruling. The district court held that plaintiff was not entitled to lost wages from January 1, 1982, to April 15, 1986, because he was not substantively entitled to automatic pay increases, not because of the statute of limitations.

Hammond complains that the court denied him costs for the period prior to his presentation of his claim to the Broken Bow City Council. Section 17-714 prohibits the recovery of costs if the claim is not properly presented. The court found that Hammond first filed a claim with the Broken Bow City Council, as required by § 17-714, on March 22, 1988. He now argues that he is entitled to costs dating back to November 1987, when, he says, he substantially complied with § 17-714 by filing a claim with the Broken Bow Board of Public Works. (He also claims that the NWPCA creates a right to costs independent of § 17-714, but Hammond failed to preserve error regarding the applicability of the NWPCA.)

Plaintiff relies on *Olson v. County of Lancaster*, 230 Neb. 904, 434 N.W.2d 307 (1989), to support his argument that filing a claim with the Broken Bow Board of Public Works satisfied the requirements of § 17-714 that "[a]ll claims against the city . . . must be presented to the council . . . in writing, with a full account of the items, and no claim or demand shall be audited

or allowed unless presented as provided for in this section."

In *Olson*, the plaintiff filed a claim directly with the county board, pursuant to the terms of a rental contract, rather than with the county clerk, as the claims statute for counties required. See Neb. Rev. Stat. § 23-135 (Reissue 1987). This court stated as follows:

> The purpose of the county claims statute . . . is to ensure that the board has proper notice of claims against the county. . . . [T]he filing requirement "provides the county with full information of the rights asserted against it, and enables it to make proper investigation concerning the merits of claims against it and to settle those of merit without the expense of litigation."

(Citations omitted.) *Olson, supra* at 908, 434 N.W.2d at 309.

Here, the claim Hammond filed with the board of public works fulfilled none of the purposes enumerated in *Olson*. The duties of the board as defined in Broken Bow's ordinances are "to operate any utility owned by [Broken Bow] and to exercise all powers conferred by law upon [Broken Bow] for the operation of utilities." The board is not empowered to investigate or settle claims, nor instructed to be a conduit for claims to the city council. The presentation of a claim to the board of public works did not facilitate the purported purpose of the claims statute: the avoidance of needless litigation through the settling of claims. Therefore, Hammond's presentation of his claim to the board of public works was not substantial compliance with § 17-714, and this assignment of error is without merit.

Regarding Hammond's claim for prejudgment interest, the district court held that the claim was unliquidated, and therefore denied interest. As to his claims accruing on or after January 1, 1987, as of that date Neb. Rev. Stat. § 45-103.04 (Reissue 1988) went into effect and precluded claims for prejudgment interest against political subdivisions.

However, as to any claims accruing before January 1, 1987, Hammond's entitlement to prejudgment interest depends upon whether the claim is liquidated or unliquidated. See, *Fletcher v. Mathew*, 233 Neb. 853, 448 N.W.2d 576 (1989); Neb. Rev. Stat. §§ 45-103.01 et seq. (Reissue 1988).

The question which must be answered is whether Hammond's claim for wages based on his misclassification—the only one of his claims upon which he was substantively entitled to recover—between April 15, 1986, and January 1, 1987, was a liquidated claim. "A claim is liquidated if the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance upon opinion or discretion." *Fletcher, supra* at 862, 448 N.W.2d at 583. The pay-level ordinance and Hammond's pay records, both of which were prepared by the City of Broken Bow, provided the bases for the district court's damages determination.

While Broken Bow contends that the amount of recovery was disputed, Broken Bow did not introduce any evidence at trial that indicated that a different basis for calculating back wages existed; it merely contended that Hammond was not entitled to recover beyond August 19, 1986. Since there was no conflicting evidence regarding the amount of damages, there was no need for the trial court to apply its discretion. Hammond's claim was liquidated, and the court erred in not granting prejudgment interest on the misclassification claim for the period between April 15, 1986, and January 1, 1987.

Finally, Hammond asserts that the district court erred in striking the prayer for relief under the NWPCA from his petition. After that allegation was stricken from his petition, Hammond filed an amended and a second amended petition, neither of which pled the NWPCA. These subsequent filings preclude Hammond from claiming error in the granting of the city's motion to strike allegations regarding NWPCA. See *Raskey v. Michelin Tire Corp.*, 223 Neb. 520, 391 N.W.2d 123 (1986) (filing an amended petition after a successful demurrer waived error in the sustaining of the demurrer). This assignment of error has been waived by the action of Hammond.

The district court erred in holding that Broken Bow's pay-level and rates-and-steps ordinances were repealed by implication by the 1986-87 appropriation ordinance, and in ruling that Hammond could not recover prejudgment interest on part of the damages he was or may be awarded.

The judgment is reversed, and the cause is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

JOLENE GUSTAFSON ET AL., APPELLEES, V. ERMA E. GUSTAFSON ET AL., APPELLEES, JAMES L. GUSTAFSON ET AL., APPELLANTS.

476 N.W.2d 819

Filed November 8, 1991. No. 89-484.

1. **Partition: Equity: Appeal and Error.** A partition action is an action in equity and is reviewable by this court de novo on the record.
2. **Deeds: Conveyances.** A quitclaim deed by its nature is an instrument of transfer whereby the grantor transfers only the interest the grantor has in the property at the time of the conveyance.
3. **Releases: Pleadings: Proof.** A party who seeks to avoid the legal effect of a release has the burden of pleading and proving facts which entitle that party to relief.

Appeal from the District Court for Harlan County: WILLIAM G. CAMBRIDGE, Judge. Affirmed.

Stanford L. Sipple, of DeCamp Legal Services, P.C., for appellants.

Ronald D. Lahners, U.S. Attorney, and Sally R. Johnson for appellee United States.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

In this partition action, the trial court found the U.S. Government's tax lien to be superior to any interest the appellant James L. Gustafson and his successors in interest claim in the proceeds of the sale of the partitioned real estate. We affirm the judgment of the district court for Harlan County.

A partition action is an action in equity and is reviewable by this court de novo on the record. *Sherman v. Schulz*, 220 Neb.

375, 370 N.W.2d 123 (1985).

Appellant Gustafson obtained part of his interest in the partitioned real estate, located in Harlan County, from the estate of his father. By purchase, he acquired additional outstanding interests in the partitioned real estate.

Two owners of partial interests in the real estate filed this partition action. When the real estate could not be physically partitioned without prejudice to some of the parties, the trial court ordered it sold and the proceeds of the sale divided. In addition to Gustafson, the other appellant in this appeal is the defendant Melvin D. Bahensky. Whether he is appealing personally or as a trustee of the I. Dammann Trust, which was also named as a defendant in the partition action, is unclear from the record. At all times relevant, Melvin and Irene D. Bahensky have been trustees of the I. Dammann Trust. At the time the partition action was filed, the trust owned financing and security interests in the crops on some of the land that was later partitioned. In the trial court, neither Bahensky, in any capacity, nor Gustafson obtained the relief each now seeks in this court.

On February 24, 1982, the appellant Bahensky, in an unrelated lawsuit, personally obtained a $75,462.34 judgment against the appellant Gustafson. On January 4, 1983, Melvin and Irene Bahensky, in still another unrelated lawsuit, personally obtained a $26,072 judgment against the appellant Gustafson. Both judgments were obtained in Buffalo County. At all times relevant herein, the judgments were on file in the district courts for both Harlan and Buffalo Counties. Each judgment encumbered all of the interests Gustafson had in the subject real estate.

On October 16, 1984, the U.S. Government filed a federal tax lien for $172,763.41, plus penalties, interest, and costs against Gustafson's real estate interests. One day later, by quitclaim deed, Gustafson and his wife, Janis A. Gustafson, transferred to Melvin D. Bahensky and Irene D. Bahensky, *as trustees of the I. Dammann Trust*, all of their interest in the real estate which was later partitioned. The quitclaim deed recited that the consideration for the transfer was the "[p]artial cancellation of debt."

The parties stipulated that Gustafson also made a $35,345.50 judgment payment on October 17, 1987 (sic). On October 24, 1984, the Bahenskys caused to be filed in the district court for Buffalo County satisfactions and releases of their judgments against Gustafson, which satisfactions and releases had been prepared and signed by their lawyer. According to a stipulation, Melvin Bahensky and Melvin and Irene Bahensky, respectively, filed the satisfactions and releases of judgments with the district court for Buffalo County.

On November 4, 1985, two heirs of the deceased Albert Gustafson filed their suit for partition of the subject real estate. The petition named, among others, James L. Gustafson and his wife, the Bahenskys, the I. Dammann Trust and the United States of America as defendants. Following the appointment of a referee, and after receiving the referee's report and holding a hearing, the trial court determined the shares of each party in the real estate involved in the partition action. The court then ordered that the real estate be sold and the proceeds distributed, except that the court reserved ruling on the priority of the U.S. tax lien and any alleged lien of the Bahenskys. Later, the court decreed that the United States held a valid tax lien against the interest James Gustafson had in the real estate that he and his wife transferred to the Bahenskys as trustees of the I. Dammann Trust. On July 8, 1988, the court found and ordered that

> the judgments of Melvin D. Bahensky and Irene D. Bahensky were released by them and they have neither pled nor proved why those releases should be rescinded and the judgment liens reinstated, and that therefor the Referee should be and hereby is directed to distribute all of the proceeds derived from the sale of the share of the said James L. Gustafson together with any interest which has accumulated thereon to The United States of America
> . . . .

On appeal, the appellants claim that the Bahenskys' personal judgment liens against Gustafson's interest in the partitioned real estate were superior to the federal tax lien, even though the Bahenskys filed a satisfaction and release of judgment as to each judgment. The United States contends that the

satisfactions and releases of judgments filed by the Bahenskys extinguished the judgment liens, and therefore the federal tax lien advanced to a position superior to any interest held by the appellants.

Appellants argue that the execution and delivery of the quitclaim deed executed and delivered by Gustafson and his wife to the Bahenskys created a security interest which preserved the judgment liens of the Bahenskys. Had they not been satisfied and released, the Bahenskys' judgment liens would have had priority over the tax lien of the federal government. There is no merit to the Bahenskys' claim that the quitclaim deed created a security interest. A quitclaim deed by its nature is an instrument of transfer whereby the grantor transfers only the interest the grantor has in the property at the time of the conveyance. See *Smith v. Berberich*, 168 Neb. 142, 95 N.W.2d 325 (1959). There is nothing in the quitclaim deed to indicate that it was intended to be a security interest for the Bahenskys' personal judgments. The fact that the quitclaim deed recited that the consideration for the deed was "[p]artial cancellation of debt" negates any theory that the execution and delivery of the quitclaim deed was intended as a security interest for the Bahenskys' personal judgments or for the renewal of a security interest, as the appellants claim. The Bahenskys' conduct in accepting and filing the quitclaim deed as trustees of the I. Dammann Trust, and their conduct in causing the filing of their personal satisfactions and releases, thereby extinguishing their judgment liens, is controlling evidence that the quitclaim deed from the Gustafsons naming the Bahenskys in their capacities as trustees of the I. Dammann Trust as grantees was never intended to be a security agreement running to the Bahenskys personally. In satisfying and releasing their personal judgments, the Bahenskys were acting through their lawyer.

Had the Bahenskys wanted to preserve their personal judgments through a security agreement, they should have insisted that they be personally named as secured parties in an instrument clearly stating that it was a security agreement. Instead, they accepted a quitclaim deed that named the Bahenskys, as trustees of the I. Dammann Trust, as the grantees. Not only did they accept a quitclaim deed naming

Melvin D. Bahensky and Irene D. Bahensky, trustees of the I. Dammann Trust, as grantees in 1984, but they also introduced into evidence a quitclaim deed which corrected a legal description in the 1984 quitclaim deed. The corrective deed from Gustafson and his wife was executed and filed July 24, 1987. It, too, named Melvin D. Bahensky and Irene D. Bahensky, as trustees of the I. Dammann Trust, as grantees. To preserve their personal judgment liens against Gustafson's interest in the subject real estate, the Bahenskys could have simply not filed any satisfaction or release of their judgments.

In advancing their position that their judgment liens were preserved by the 1984 quitclaim deed from Gustafson and his wife, the Bahenskys fail to separate their personal financial interests from their interests as trustees of the I. Dammann Trust. The interests are not one and the same. The quitclaim deeds transferred the interest of Gustafson and his wife to the Bahenskys as trustees of the I. Dammann Trust, while the judgment liens belonged to the Bahenskys personally, and they were extinguished by the Bahenskys' own acts.

The trial court decreed in its judgment in partition that the Bahenskys, *as the I. Dammann Trust trustees*, owned all of the interests in the partitioned land formerly owned by Gustafson and his wife. After the judgment was entered, the Bahenskys, *as trustees of the I. Dammann Trust*, filed a petition to enjoin the sale of the partitioned property. In that petition, the Bahenskys claimed that as trustees of the I. Dammann Trust, they were the owners of the interests in the partitioned land formerly owned by Gustafson and his wife. As trustees, they also claimed ownership of "potential" liens against the partitioned real estate. After the issue of the Bahenskys' judgment liens was decided by the court adversely to them, neither of the Bahenskys, as a trustee of the I. Dammann Trust, appealed the trial court's determination that the federal government was entitled to the proceeds from sale of what was originally Gustafson's interest in the partitioned land. The notice of appeal was signed only by Melvin D. Bahensky, without any designation of his trusteeship.

The Bahenskys, either personally or as trustees of the I. Dammann Trust, never pled or proved why their satisfactions

and releases of judgments should be rescinded and the judgment liens reinstated. A party who seeks to avoid the legal effect of a release has the burden of pleading and proving facts which entitle that party to relief. See *Watmore v. Ford*, 229 Neb. 121, 425 N.W.2d 612 (1988), *overruled on other grounds, Landon v. Pettijohn*, 231 Neb. 837, 438 N.W.2d 757 (1989).

On de novo review, we hold that the Gustafsons' quitclaim deed, which was delivered to the Bahenskys as trustees of the I. Dammann Trust, did not create or preserve a security interest in favor of the Bahenskys, in any of their capacities.

The judgment of the trial court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. CARLOS VALDEZ, APPELLANT.
476 N.W.2d 814

Filed November 8, 1991. No. 90-552.

1. **Criminal Law: Motions for Continuance: Appeal and Error.** A motion for continuance in a criminal case is addressed to the discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion.
2. _____: _____: _____. There is no abuse of discretion by a court in denying a continuance unless it clearly appears that a defendant suffered prejudice as a result thereof.
3. **Motions for Mistrial: Appeal and Error.** In order for error to be predicated upon misconduct of counsel, it must be so flagrant that neither retraction nor rebuke from the court can entirely destroy its influence.
4. **Convictions: Appeal and Error.** A conviction will not be set aside unless the defendant meets his burden of showing that the claimed error created actual prejudice rather than the mere possibility of prejudice.
5. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion on the part of the sentencing court.

Appeal from the District Court for Scotts Bluff County: ROBERT O. HIPPE, Judge. Affirmed.

Charles F. Fitzke, Scotts Bluff County Public Defender, and Bernard J. Straetker for appellant.

Don Stenberg, Attorney General, and Barry Waid for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

Defendant, Carlos Valdez, was charged in Scotts Bluff County with intentionally distributing, delivering, or dispensing cocaine on January 9, 1990, in violation of Neb. Rev. Stat. § 28-416(1)(a) (Reissue 1989). After jury trial, defendant was found guilty. After a presentence investigation, defendant was sentenced to 4 to 7 years' imprisonment. He timely appealed to this court, assigning as error the actions of the trial court in (1) failing to grant defendant's motion for a continuance of the trial, (2) failing to grant defendant's motion for mistrial, and (3) imposing "an unreasonable sentence under the circumstances." We affirm.

In connection with defendant's contentions concerning the trial court's refusal to grant a continuance, the record shows the following: On January 30, 1990, defendant appeared in the county court. The complaint was read to him, and the county court, "satisfied that he [was] indigent," appointed the public defender to represent defendant. Defendant's bond was set at $50,000, and the preliminary hearing was set for February 9.

On February 1, defendant appeared with private counsel for a bond review hearing. Defendant's bond was reduced to $25,000. Defendant posted 10 percent of this amount and was released on bond. On February 5, the public defender was allowed to withdraw. On February 9, defendant's privately retained counsel was permitted to withdraw, due to a conflict of interest, and the preliminary hearing was continued to February 27.

On February 27, defendant appeared with a different privately retained attorney, Robert L. Gridley. After the preliminary hearing, defendant was bound over to the district court for trial.

On March 2, Gridley filed a plea in abatement on behalf of defendant. On March 16, this plea was overruled and defendant was arraigned. His plea of not guilty was accepted, and trial was

set for the jury term beginning on April 30.

On March 30, Gridley, on behalf of defendant, filed a motion for discovery and a motion for change of venue. On April 13, both defendant's and the State's motions for discovery were granted. On April 20, a hearing was held on defendant's motion for change of venue, and the motion was denied. Defendant then advised the court that he was unable to retain Gridley for future representation. After inquiry, the court found that "the defendant and counsel were willing to enter into an agreement for later payment and therefore the defendant did not require appointed counsel."

On April 25, Gridley filed a motion to withdraw and a motion for continuance in the event the motion to withdraw was denied. On April 26, the trial court had a hearing on these motions. Defendant, Gridley, and the county attorney were present. Evidence was adduced. The court then "overruled defense counsel's motion to withdraw, motion for a [sic] appointment of counsel and motion for continuance."

On April 30, Gridley filed another motion to withdraw. Accompanying this motion was Gridley's affidavit stating that defendant had discharged him on April 27, and stating that the relationship between Gridley and defendant had reached the point where it was "impossible for [the attorney] to prepare an adequate defense in this matter." Also accompanying this motion was a "Discharge of Counsel" signed by defendant.

A hearing was held on this motion on the morning of April 30, just before a jury was to be selected. The court denied the motion, but did appoint Charles Fitzke, the public defender, as cocounsel with Gridley. A jury was then selected with the understanding that trial was to begin on May 7. On May 3, defendant appeared before the court with both Gridley and Fitzke, as his cocounsel, and again requested a continuance of the trial. The motion was denied. The trial began with opening statements at approximately 9 a.m. on May 7. Both Gridley and Fitzke were present at the trial, but public defender Fitzke conducted cross-examination and direct examination on behalf of defendant. Six witnesses were called by the State. Defendant testified in his own behalf. The jury reached its verdict of guilty on May 7 at 7:30 p.m.

It is with this procedural background that defendant contends the court erred in not granting any of his requested continuances. The law in this area is settled. " 'A motion for a continuance in a criminal case is addressed to the . . . discretion of the trial court, and that court's ruling will not be disturbed on appeal absent a showing of abuse of discretion.' " *State v. Blair*, 230 Neb. 775, 779-80, 433 N.W.2d 518, 522 (1988), quoting *State v. Eichelberger*, 227 Neb. 545, 418 N.W.2d 580 (1988).

In determining whether a trial court has abused its discretion in refusing to grant a continuance, it is proper for the reviewing court to look at the entire record in the case. *State v. Broomhall*, 221 Neb. 27, 374 N.W.2d 845 (1985). See Neb. Rev. Stat. § 25-1148 (Reissue 1989).

Examination of the entire record shows that the case against defendant was proved by the testimony of a "cooperating individual," who had himself been arrested for selling drugs. The narcotics authorities provided money, and the cooperating individual purchased cocaine from defendant. Both the cooperating individual and the officer in charge of the transaction testified at the preliminary hearing and were cross-examined by Gridley, acting as defendant's attorney. Both testified at the trial. Three other officers testified at trial as to various details of the cocaine sale, and a chemist testified that the substance sold was cocaine. Defendant testified at trial that he sold the cocaine to the cooperating individual, because "I [the defendant] needed the money . . . and I was going to get a good deal, so I went and I got it for him." Defendant did further testify he had refused to make other sales to the same individual. The case was tried in 1 day. No involved factual issues were present.

Defendant apparently wanted to present a "unique" entrapment defense, but defendant himself would know the facts necessary to prove such a defense. After the pretrial hearings, no statements were made to the court setting out any specific reason why additional time was needed. As we stated in *State v. Pierce and Wells*, 215 Neb. 512, 519, 340 N.W.2d 122, 127 (1983), "There is no abuse of discretion by the court in denying a continuance unless it clearly appears that defendant

suffered prejudice as a result thereof."

The trial court did not abuse its discretion in denying a continuance of the trial. Defendant's contention of error in this respect is without merit.

Defendant then contends that the trial court erred in denying defendant's request for a mistrial. Defendant contends that

> the issues involved are whether the prosecution overtly sought a decision on an improper basis, whether either irrelevant evidence or relevant but overwhelmingly prejudicial evidence, was improperly exhibited to the jury, and whether an attempt to cleanse the record with a tenuous finding of relevance could cure obvious prejudicial error.

The law with regard to granting a mistrial based on prosecutorial misconduct is settled. In order for error to be predicated upon misconduct of counsel, it must be so flagrant that neither retraction nor rebuke from the court can entirely destroy its influence. *Parker v. State*, 67 Neb. 555, 93 N.W. 1037 (1903). Before it is necessary to grant a mistrial due to prosecutorial misconduct, the defendant must show that a "substantial miscarriage of justice has actually occurred." Neb. Rev. Stat. § 29-2308 (Reissue 1989); *State v. Wounded Arrow*, 207 Neb. 544, 300 N.W.2d 19 (1980). The conduct of a prosecutor which does not mislead and unduly influence the jury and thereby prejudice the rights of the defendant does not constitute misconduct. *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984).

A conviction will not be set aside unless the defendant meets his burden of showing that the claimed error created actual prejudice rather than the mere possibility of prejudice. *State v. LeBron, supra.*

Defendant's motion for mistrial was made during the State's direct examination of its first witness. That questioning covered 28 pages of the bill of exceptions. This witness testified as to the arrest of the cooperating individual and as to certain items confiscated from defendant's residence when defendant was served with an arrest warrant and a search warrant. In two pages of questioning, this witness identified "a Smith & Wesson Model 66, .357 revolver" and "an Intratec Model Tec-9 . . . a .9

[sic] millimeter semiautomatic handgun."

The direct questioning of this witness then was interrupted, and the jury was excused for a morning recess. Defendant's counsel then made the following motion:

> MR. FITZKE: If it please the Court, at this time, the defendant requests the Court to order a mistrial in this case and discharge the jury presently impaneled for a specific reason which I request to have noted of record. May I expound upon that a little bit? May the record show, please, that even after an admonition off the record from the Court, the State continued to exhibit two dangerous looking weapons before the jury, neither of which had yet been admitted into evidence and neither of which the Court has already ruled may be admissible only for a limited purpose and not for the purpose of proving the truth or falsity of any issue in this case.

The trial court responded:

> THE COURT: Well, there is a way to cure it, and that is, if it is received in evidence, it will be harmless error anyway. I've told counsel and I will tell the witnesses for the state now, the rule on exhibits is, they shall not be demonstrated to the jury until the judge has decided whether to receive it. That's pretty simple and follow it.

When the trial resumed, the court told the jurors that the case included defendant's claim that if the jury did find that defendant had sold the cocaine in question, he had been entrapped into so doing by the State. The court instructed the jury that some evidence before it was relevant only for limited purposes "tending to show or negate the defendant's willingness, knowledge, intent, pressure, or inducement, and it's being received for that limited purpose only and not as direct evidence [of the crime charged]." The entrapment issue had been raised by defendant's counsel in his opening statements to the jury.

When the guns were later admitted into evidence, it was stated by the court that they were being received into evidence for that limited purpose only. No assignment of error is made in this court as to the trial court's admitting such evidence.

Since the weapons were finally received in evidence, it does

not constitute reversible error, in the circumstances of this case, for counsel to refer to them. After the guns were received in evidence, defense counsel again objected that "flaunting [the guns] in front of the jury at this time is nothing but inflammatory." The court replied, "I wouldn't characterize what they are doing is flaunting them."

The record does not show the physical acts complained of, and the trial court determined that there was no "flaunting" of the guns. The record does not show, in any way, that the court erred in denying defendant's motion for mistrial.

Defendant's last assignment of error is that the trial court erred in imposing "an unreasonable sentence." As stated above, defendant was sentenced to 4 to 7 years' imprisonment. The presentence investigation shows that this conviction represents defendant's first conviction of a felony. His record consisted only of a driving while intoxicated conviction and a speeding conviction. Nonetheless, defendant has been convicted of the sale of cocaine, a Class II felony in this case, with a possible sentence of 1 to 50 years' imprisonment. It was shown he was in possession of weapons and cash at the time of his arrest. Cocaine, in itself, is one of the plagues of our society, and sellers of that product are most dangerous.

We have said that a sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion on the part of the sentencing court. *State v. Morley*, *ante* p. 141, 474 N.W.2d 660 (1991); *State v. Campbell*, *ante* p. 14, 473 N.W.2d 420 (1991). The sentencing court did not abuse its discretion in imposing the sentence it did.

There being no merit to defendant's assignments of error, the judgment and sentence are affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. BRYAN J. KENNEY, APPELLANT.

476 N.W.2d 810

Filed November 8, 1991. No. 90-932.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.
2. **Theft: Intent.** A person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof.
3. **Criminal Law: Intent: Proof: Circumstantial Evidence.** Intent is a mental process and it therefore generally remains hidden within the mind where it is conceived. It is rarely if ever susceptible of proof by direct evidence. It may, however, be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his conduct.
4. _____: _____: _____: _____. When an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence.
5. **Convictions: Proof: Circumstantial Evidence.** A conviction may be based on circumstantial evidence as long as that evidence, taken as a whole, establishes guilt beyond a reasonable doubt.
6. **Trial: Evidence: Motions to Suppress: Waiver: Appeal and Error.** A failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal.
7. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Don Stenberg, Attorney General, J. Kirk Brown, and, on brief, LeRoy W. Sievers for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Following a bench trial, the district court for Douglas

County convicted Bryan J. Kennedy of the theft of approximately $5,000 in equipment from the music department of Ralston High School. Kennedy appeals his conviction and his sentence of not less than 3 nor more than 5 years' imprisonment. We affirm.

The defendant sets forth three assignments of error. Restated, they are that (1) the evidence is insufficient as a matter of law to sustain Kennedy's conviction; (2) the trial court erred in overruling the defendant's motion to suppress statements made by him to a police officer; and (3) the sentence imposed is excessive.

We first consider Kennedy's claim that the evidence is insufficient as a matter of law to sustain the defendant's conviction. That claim is without merit.

In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. *State v. Jensen*, 238 Neb. 801, 472 N.W.2d 423 (1991).

Taking the view most favorable to the State, the record in Kennedy's case reflects the following: On July 17, 1989, Kennedy requested permission from the principal of Ralston High School to borrow some equipment from the school's music department. Permission was granted with the proviso that the equipment was to be returned by July 24. The equipment consisted of a Peavey eight-channel mixing board, a 300-watt stereo, an amplifier, two Realistic tape decks, a compact disc player, various patch cords, four Bose speakers, stands for the speakers, and impact cases for the mixing board and amplifier. When the equipment had not been returned by August 30, the police were notified that the equipment had not been returned to the school. On September 28, personnel from the Ralston school hand delivered a letter to Kennedy requesting that the equipment be returned by October 4. The equipment was never returned to the school by Kennedy. Some of it was located in a pawnshop, but it was sold to an

unidentified person. The record discloses that the pawned equipment was never recovered by the school.

The record reflects that Kennedy kept the equipment in his apartment approximately a month after he was supposed to return it to the school. The defendant knew that his then roommate used the equipment. Kennedy used it for recording and stated, "I treated it as my own . . . . I took care of it. I didn't neglect it in any way." The defendant's roommate used the equipment while the roommate and a group performed at a bar in Omaha.

Kennedy was located by a Ralston police officer on October 19, and he was questioned as to the location of the school's equipment. In both oral and written statements given to the officer, the defendant admitted that he had borrowed equipment from Ralston High School. He said that the equipment had been in his apartment for a period of time after it was used for the purpose for which it was borrowed. He claimed that the equipment was taken by his former roommate and that the two, after some difference of opinion concerning the sale price, agreed to sell the equipment for $500. The record reflects that this was in late August. When his former roommate failed to pay him a share of the proceeds from the sale, Kennedy went to an apartment where his roommate was staying and, apparently in the roommate's absence, took $250 from a closet as "payment for the items," according to the police.

The defendant was convicted of theft by unlawful taking, in violation of Neb. Rev. Stat. § 28-511(1) (Reissue 1989). That statute provides that "[a] person is guilty of theft if he or she takes, or exercises control over, movable property of another with the intent to deprive him or her thereof." Kennedy argues that the "record contains nothing that indicates beyond a reasonable doubt that [he] had intended to deprive the school of its property . . . ." Brief for appellant at 8.

"Intent" is a mental process and it therefore generally remains hidden within the mind where it is conceived. It is rarely if ever susceptible of proof by direct evidence. It may, however, be inferred from the words and acts of the defendant and from the facts and circumstances surrounding his conduct. *State ex*

rel. NSBA v. Veith, 238 Neb. 239, 470 N.W.2d 549 (1991). Stated another way, when an element of a crime involves existence of a defendant's mental process or other state of mind of an accused, such elements involve a question of fact and may be proved by circumstantial evidence. *State v. Jensen, supra.* A conviction may be based on circumstantial evidence as long as that evidence, taken as a whole, establishes guilt beyond a reasonable doubt. *State v. West*, 238 Neb. 939, 473 N.W.2d 81 (1991).

The record reveals that the defendant failed to return the equipment as he promised and in fact never did return it. Kennedy claims the equipment was not returned initially because he had no means of transporting it. The defendant kept the equipment at his apartment and used it as his own for a period of approximately 1 month. He failed to notify either the school or the police when, he claims, he discovered the equipment was missing from his apartment. Kennedy agreed to his roommate's plan to sell the equipment and ultimately received $250 as "payment for the items." He explained that he felt that $250 would be sufficient leverage to gain the return of the equipment, which was worth approximately $5,000.

"Deprive" means "[t]o dispose of the property of another so as to create a substantial risk that the owner will not recover it in the condition it was when the actor obtained it." Neb. Rev. Stat. § 28-509(1)(b) (Reissue 1989). In pronouncing Kennedy guilty, the trial court found unworthy of belief the defendant's testimony, in which he attempted to distance himself from any mens rea in connection with the crime with which he was charged. The court found the defendant's agreement to sell the school's equipment and Kennedy's conduct in taking $250 from his former roommate's apartment when the defendant did not receive a share of the proceeds from the sale of the equipment supplied the necessary intent to convict Kennedy of taking, or exercising control over, movable property of another with the intent to deprive the owner thereof. From the direct and circumstantial evidence, and from the inferences to be drawn therefrom, a fact finder could find beyond a reasonable doubt that Kennedy exercised control over and intended to "deprive" the Ralston school of its movable property. There is

overwhelming evidence that the equipment involved had a value in excess of $5,000. The defendant's claim that, as a matter of law, there was insufficient evidence to convict him is without merit.

Kennedy claims that the trial court erred in overruling his motion to suppress the statements he made to a Ralston police officer on October 19. After a suppression hearing, the trial court found that Kennedy was advised of his rights under *Miranda* and waived them and that his statement was freely, voluntarily, knowingly, and intelligently given. The record reveals that this evidence, some of which is contained in exhibits 1, 2, 4, and 5, was offered and received at trial without a timely objection from the defendant. A failure to object to evidence at trial, even though the evidence was the subject of a previous motion to suppress, waives the objection, and a party will not be heard to complain of the alleged error on appeal. *State v. Jensen*, 238 Neb. 801, 472 N.W.2d 423 (1991). The trial court committed no error in admitting the defendant's statements into evidence.

In Kennedy's final assignment of error, he alleges that the sentence imposed by the district court is excessive. Because the value of the equipment the defendant obtained from Ralston High School exceeded $1,000, Kennedy was charged with a Class III felony, pursuant to § 28-511(1) and Neb. Rev. Stat. § 28-518(1) (Reissue 1989). The penalty authorized upon conviction of a Class III felony is not less than 1 nor more than 20 years' imprisonment, a fine up to $25,000, or both. Neb. Rev. Stat. § 28-105 (Reissue 1989). A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *State v. Lixey*, 238 Neb. 540, 471 N.W.2d 444 (1991). In view of the magnitude of the offense the defendant committed, and in view of Kennedy's prior convictions for theft by receiving stolen property, carrying a concealed weapon, and criminal mischief, his sentence of 3 to 5 years' imprisonment is not excessive.

AFFIRMED.

GRANT, J., not participating.

DONALD FLAMME, APPELLANT, V. WOLF INSURANCE AGENCY, A NEBRASKA PARTNERSHIP, AND STEVEN E. GRUEBER, APPELLEES. VERONICA FLAMME, APPELLANT, V. WOLF INSURANCE AGENCY, A NEBRASKA PARTNERSHIP, AND STEVEN E. GRUEBER, APPELLEES.

476 N.W.2d 802

Filed November 8, 1991. Nos. 90-1222, 90-1223.

1. **Summary Judgment: Appeal and Error.** When reviewing a motion for summary judgment, the Nebraska Supreme Court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from that evidence.
2. **Summary Judgment.** Summary judgment is properly granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such facts and that the moving party is entitled to judgment as a matter of law.
3. **Summary Judgment: Proof.** A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.
4. **Insurance: Agents: Brokers: Negligence: Proximate Cause: Liability: Damages.** An insurance agent or broker who agrees to obtain insurance for another but negligently fails to do so is liable for the damage proximately caused by such negligence; the measure of damages is the amount that would have been due under the policy if it had been obtained by the agent or broker.
5. **Insurance: Agents.** It would be an unreasonable burden to impose upon insurance agents a duty to anticipate what coverage an individual should have, absent the insured's requesting coverage in at least a general way.
6. **Insurance: Agents: Brokers.** If an insurance agent or broker undertakes to advise an insured, the agent or broker must use reasonable care to provide accurate information.
7. **Insurance: Agents: Brokers: Liability: Negligence.** An insurance agent or broker may be held liable for a negligent misrepresentation made to an insured.
8. **Insurance: Agents: Contracts.** An insured has no right to rely upon an agent's patently absurd interpretation of a policy. He ordinarily may rightfully rely, however, upon an agent's interpretation that is plausible and not in patent conflict with the printed policy although legally untenable.
9. **Insurance: Contracts.** The single circumstance that the insured failed to examine his policy prior to the loss is ordinarily insufficient for denial of relief.

Appeal from the District Court for Colfax County: JOHN C. WHITEHEAD, Judge. Reversed and remanded for further proceedings.

Stephen L. Gerdes for appellants.

Daniel P. Chesire and John A. Cheloha, of Kennedy, Holland, DeLacy & Svoboda, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

In these consolidated cases, Donald and Veronica Flamme each appeal summary judgment holdings that an insurance agent did not (1) negligently misrepresent that their underinsured motorist insurance coverage provided $50,000 over and above the coverage available from an underinsured motorist or (2) negligently fail to obtain such insurance for them. The suits were brought against Steven E. Grueber and Wolf Insurance Agency, in which Grueber was the managing partner.

Since there is a material issue of fact in each case, we reverse the trial court's judgments and remand the causes for further proceedings.

"[W]hen reviewing a motion for summary judgment, the Supreme Court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from that evidence. [Citation omitted.]" *Nu-Dwarf Farms v. Stratbucker Farms*, 238 Neb. 395, 397, 470 N.W.2d 772, 775 (1991). Accordingly, we review the evidence in the light most favorable to the Flammes and give them the benefit of all reasonable inferences deducible from that evidence.

On November 27, 1989, the Flammes filed their original petitions as separate actions in the district court for Colfax County. In their third amended petitions, which were filed on September 17, 1990, the Flammes alleged that on the morning of November 28, 1985, they were involved in an automobile accident near Howells, Nebraska; that the accident was caused by the negligence of Jennifer Krenzien, who "rear-ended" a vehicle driven by the Flammes' son in which the Flammes were passengers; that as a direct and proximate result of the accident, each of the Flammes suffered damages in excess of $150,000;

and that Krenzien's total automobile liability coverage was in the amount of $100,000 per person. The car in which the Flammes were riding was registered in their names. In the third amended petitions, it was also alleged that Cornhusker Casualty Company (Cornhusker) issued automobile policy No. BAP-4381 to Flamme Bros., Inc., Donald and Veronica Flamme, and Vernon and Sharon Flamme; that the policy provided underinsured motorist coverage in the amount of $50,000 per person; that the policy was in effect on November 28, 1985; and that each of the plaintiffs was an insured under the policy. In their answers to the second amended petitions, the defendants admitted that each of the plaintiffs would qualify as an insured under the policy.

Policy No. BAP-4381 was issued for the period of December 21, 1984, to December 21, 1985, and an endorsement attached to that policy, "CA 2X 17 (Ed. 01 78)," was the only endorsement available from Cornhusker which provided any type of underinsured motorist insurance. In their answers, the defendants stated that "there is no specific language defining underinsured motorist but that . . . a vehicle [is defined] as being underinsured when the liability bond or policy provide[s] at least the applicable statutory limits but that the limits are less than the Cornhusker . . . policy." The endorsement to the policy specifically provides in relevant part:

> "**Uninsured motor vehicle**" means a land motor vehicle or trailer:
>
> . . . .
>
> b. For which the sum of all liability bonds or policies at the time of an **accident** provides at least the amounts required by the applicable law where a covered **auto** is principally garaged but their limits are less than the limit of this insurance . . . .

The endorsement further provides, "If this insurance provides a limit in excess of the amounts required by the applicable law where a covered **auto** is principally garaged, **we** will pay only after all liability bonds or policies have been exhausted by judgments or payments." The endorsement also stated, "Any amount payable under the insurance shall be reduced by . . . [a]ll sums paid by or for anyone who is legally

responsible, including all sums paid under the policy's LIABILITY INSURANCE." At the time of the relevant policy period, the Legislature had not yet enacted the Underinsured Motorist Insurance Coverage Act, see Neb. Rev. Stat. §§ 60-571 to 60-582 (Reissue 1988), which was passed in 1986.

In affidavits received in evidence, the Flammes stated that after each of them read a magazine article concerning underinsured motorist coverage, they met with Grueber to discuss their automobile insurance; that the magazine article recommended that one purchase a policy which would pay over and above the limits of coverage of the underinsured motorist; and that Grueber informed them on November 14, 1984, that their policy contained $50,000 of underinsured motorist coverage over and above the limits of insurance of any underinsured motorist. The Flammes also deposed the same. An entry in Mrs. Flamme's diary and a notation made by her on the Flammes' policy corroborate the Flammes' allegations. Grueber denied having any conversations regarding underinsured motorist insurance with either of the Flammes.

At the time of trial, Grueber had been in the insurance business since his graduation from college in 1971, was licensed by the state to sell insurance, and attended periodic insurance seminars and classes. Wolf Insurance Agency had been selling insurance to the Flammes since at least 1971 and offered insurance coverage from carriers other than Cornhusker.

The Flammes alleged in their respective third amended petitions that demand was made upon Cornhusker under the policy, but that Cornhusker denied the claim because Cornhusker claimed the coverage under Krenzien's automobile liability policy was greater than the underinsured motorist coverage afforded by the Cornhusker policy. The Flammes each brought a separate action against Cornhusker, but the record is silent as to the outcome of those lawsuits.

In their affidavits, each of the Flammes declared that had Grueber advised them otherwise, (1) they would have asked Grueber to have the policy drafted so as to provide underinsured motorist insurance over and above the limits of the underinsured motorist's insurance; (2) if that type of coverage was not provided by Cornhusker, they would have

requested that Grueber locate a company which did provide such coverage; and (3) if Grueber was unable to locate such a company, they would have requested that he issue the Cornhusker policy with underinsured motorist coverage limits of at least $250,000.

The Flammes asserted in each of their third amended petitions that Grueber represented to them that the underinsured motorist coverage in their insurance policy provided an additional $50,000 of coverage per person regardless of the amount of insurance carried by the party who injured them and that during that same conversation, the Flammes confirmed that they wanted an insurance policy that provided $50,000 of underinsured motorist coverage over and above any coverage that might be available from a tort-feasor. It was further alleged that the defendants were negligent in that they failed to place the underinsured motorist coverage in the form that Grueber represented would be included in the policy. Thus, the Flammes' third amended petitions asserted two grounds for recovery: (1) negligent failure to obtain the requested underinsured coverage and (2) negligent misrepresentation regarding the coverage provided by the policy. The parties on appeal have treated each case as presenting those two grounds for relief. This court will accordingly confine its analysis to those two issues. Although the third amended petitions were filed after the summary judgment motions were filed, the petitions were included in the exhibits received in evidence.

Following a hearing, the defendants' motions for summary judgment were sustained. The Flammes' motions for a new trial were overruled, and they timely appealed to this court. The parties stipulated to consolidate the cases on appeal, which stipulation was allowed.

I. SUMMARY JUDGMENT

Summary judgment is properly granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such facts and that the moving

> party is entitled to judgment as a matter of law. [Citation omitted.]

Krohn v. Gardner, 238 Neb. 460, 462, 471 N.W.2d 391, 394 (1991).

> Moreover, a party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party. [Citations omitted.]

Flynn v. Bausch, 238 Neb. 61, 65-66, 469 N.W.2d 125, 128 (1991).

II. NEGLIGENT FAILURE TO OBTAIN COVERAGE

An insurance agent or broker who agrees to obtain insurance for another but negligently fails to do so is liable for the damage proximately caused by such negligence; the measure of damages is the amount that would have been due under the policy if it had been obtained by the agent or broker. *Kenyon & Larsen v. Deyle*, 205 Neb. 209, 286 N.W.2d 759 (1980). The defendants assert that the Flammes cannot recover because they failed to show that they requested underinsured motorist coverage in excess of the liability insurance of an underinsured motorist, as alleged in the Flammes' third amended petitions.

Mrs. Flamme's deposition reflects that the Flammes met with Grueber to discuss the terms of the policy approximately 4 to 6 weeks before the time for renewing the policy, that Grueber's misrepresentation occurred in the course of his explanation of the policy, and that she could not recall if it was made in response to a specific question, although she posed a lot of questions to Grueber. When she was asked if she specifically asked Grueber for excess underinsured motorist coverage, Mrs. Flamme asserted that she could not recall. No other evidence

was offered on this point in either of the Flammes' cases.

In *Polski v. Powers*, 221 Neb. 361, 364, 377 N.W.2d 106, 108 (1985), this court held, "We believe it would be an unreasonable burden to impose upon insurance agents a duty to anticipate what coverage an individual should have, absent the insured's requesting coverage in at least a general way." There is no evidence in this case that the Flammes requested underinsured motorist coverage over and above someone else's liability insurance or that Grueber agreed to obtain such coverage. Therefore, Grueber and his agency can hardly be held liable for failing to obtain such coverage.

The defendants' argument, however, holds no force with respect to the Flammes' claim of negligent misrepresentation. As will be discussed, such a cause of action does not require a request to obtain certain coverage. If an insurance agent or broker undertakes to advise an insured, the agent or broker must use reasonable care to provide accurate information. See *Trotter v. State Farm*, 297 S.C. 465, 377 S.E.2d 343 (1988). In this case, the Flammes sought Grueber's advice in order to make a determination as to the renewal of their policy. There is evidence that he represented the underinsured motorist insurance to be of a certain type. Grueber had a duty of reasonable care to provide correct information in that respect.

III. NEGLIGENT MISREPRESENTATION

In *Bayer v. Lutheran Mut. Life Ins. Co.*, 184 Neb. 826, 172 N.W.2d 400 (1969), this court imposed liability when an insured relied upon an insurance company's general agent's misrepresentation. It is well established that an insurance agent or broker may be held liable for a negligent misrepresentation made to an insured. See, e.g., *Connell v. State Farm Mut. Auto Ins. Co.*, 482 So. 2d 1165 (Ala. 1985); *Clary Ins. Agcy. v. Doyle*, 620 P.2d 194 (Alaska 1980); *Runia v. Marguth Agency, Inc.*, 437 N.W.2d 45 (Minn. 1989); *Rotanelli v. Madden*, 172 A.D.2d 815, 569 N.Y.S.2d 187 (1991); Annot., 72 A.L.R.3d 704 (1976).

Mr. Flamme testified that he relied on Grueber's representation as to what was provided in the instant insurance policy and that he did not know if he completely read the policy.

He did not look at the endorsement at issue until 1990 and never discussed it with Grueber or Jeff Striegel, who worked for Cornhusker. Mrs. Flamme stated that she "would check the vehicle list and go over the numbers" and that she did not read the whole policy. She further reported that she did not read the instant endorsement until shortly before her deposition was taken. No attorney reviewed the policy for the Flammes. The defendants contend that the Flammes' failure to read their policy, including the endorsement, bars their recovery.

It is true that this court has held in other contexts that one who enters into a contractual relationship is charged with knowledge of the contents of the contract and is bound thereby. See, e.g., *Nichols v. Ach*, 233 Neb. 634, 447 N.W.2d 220 (1989). With respect to insurance policies, this court has held: "An insured has no right to rely upon an agent's patently absurd interpretation of a policy. He ordinarily may rightfully rely, however, upon an agent's interpretation that is plausible and not in patent conflict with the printed policy although legally untenable. [Citation omitted]." *Bayer, supra* at 830, 172 N.W.2d at 402. In an action to reform an insurance contract because of an agent's misrepresentation, this court held, "The single circumstance that the insured failed to examine his policy prior to the loss is ordinarily insufficient for denial of relief. [Citations omitted.]" *Heikes v. Farm Bureau Ins. Co.*, 181 Neb. 827, 830, 151 N.W.2d 336, 339 (1967). Accord, *Mogil v. Maryland Casualty Co.*, 147 Neb. 1087, 26 N.W.2d 126 (1947); *Davis v. Highway Motor Underwriters*, 120 Neb. 734, 235 N.W. 325 (1931).

It is unlikely that a reasonable reading of the policy would have disclosed the falsity of Grueber's alleged representation. Several steps are required in locating the language which provides the coverage at issue. First, the underinsured motorist insurance is provided by an endorsement to the policy, not the policy itself. Second, underinsured motorist coverage is never specifically referred to in the endorsement. Instead, underinsured motorist insurance is provided by defining "uninsured motor vehicle" in such a way as to provide underinsured motorist coverage. As stated, the endorsement to the policy provides in pertinent part:

> "**Uninsured motor vehicle**" means a land motor vehicle or trailer:
>
> . . . .
>
> b. For which the sum of all liability bonds or policies at the time of an **accident** provides at least the amounts required by the applicable law where a covered **auto** is principally garaged but their limits are less than the limit of this insurance . . . .

Although the endorsement states that "[a]ny amount payable under the insurance shall be reduced by . . . [a]ll sums paid by or for anyone who is legally responsible," the endorsement also provides that "[i]f this insurance provides a limit in excess of the amounts required by the applicable law where a covered **auto** is principally garaged, **we** will pay only after all liability bonds or policies have been exhausted by judgments or payments." In view of the convoluted method by which underinsured motorist coverage was provided by Cornhusker, particularly by providing coverage via a definition which does not even mention the term "underinsured," it is doubtful that if a reasonable person had read the endorsement's seemingly contradictory provisions, that person would have understood that it did not provide coverage in excess of the tort-feasor's liability insurance. Therefore, the Flammes could reasonably rely on Grueber's plausible interpretation of the endorsement. See, e.g., *Chandler v. Jones*, 532 So. 2d 402 (La. App. 1988) (an insured should not be held to have read and understood complex and often confusing intricate detailed provisions of an insurance policy); *Giles v. Lanford & Gibson, Inc.*, 285 S.C. 285, 328 S.E.2d 916 (1985) (insured could not have deciphered the language sufficiently to conclude the policy provided a different coverage than that represented by an insurance agent).

There was evidence that the endorsement may have been included in the policy since at least 1980. Nonetheless, that fact does not make the Flammes' failure to read the endorsement any more culpable. As the previous discussion demonstrates, there is nothing to indicate that an insured would have understood the endorsement any better in 1980 than in 1984. More importantly, it was not until November 1984 that the

alleged misrepresentation was made. It was at that time that the terms of underinsured motorist coverage became relevant in this case.

The defendants next contend that the Flammes failed to show proximate cause because they could not have obtained the desired coverage regardless of Grueber's representation. For that contention, they rely on Kenneth Dietz' and Grueber's affidavits. Dietz, an employee of Cornhusker, asserted in his affidavit received in evidence that Cornhusker did not write any insurance policy which provided $50,000 of underinsured motorist coverage over and above any coverage that might be available. Grueber's affidavit, also received in evidence, states that "there was no underinsured motorist coverage available through any insurance company that affiant worked for during 1984 through 1985 that would have provided underinsured motorist coverage which would have been excess over and above the other person's liability coverage."

Even if Dietz' and Grueber's affidavits are accepted as true, each of the Flammes' affidavits reflects that if Grueber could not have redrafted the Cornhusker policy to correspond with their understanding or if Grueber could not have located another carrier that would provide underinsured motorist coverage over and above a tort-feasor's liability, they would have requested that he issue the Cornhusker policy with underinsured motorist coverage limits of at least $250,000. Therefore, the evidence reflects a material issue of fact of whether the Flammes could have obtained the coverage. As stated, summary judgment may not be used for disposing of material questions of fact.

The judgments are reversed and the causes remanded for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SHANAHAN, J., concurring.

Since the majority has correctly concluded that summary judgment was improperly granted, I concur that the district court's judgment must be reversed. However, an aspect of the majority opinion should be emphasized and even underscored as an innovation in Nebraska law—expansion or enlargement

of the cause of action for misrepresentation of a material fact, sometimes called "fraudulent misrepresentation."

If some have not taken note, as the result of the *Flamme* decision today, Nebraska recognizes a cause of action for "negligent misrepresentation," which might be more accurately labeled "misrepresentation through negligence," when one's negligence causes or results in misrepresentation of a material fact. The majority states that a cause of action for "a negligent misrepresentation" is "well established," and then refers to decisions in other jurisdictions which recognize actionable negligent misrepresentation. "Well established" is at the most misleading and at the least an inaccurate descriptive reference to "negligent misrepresentation," which has never inhabited Nebraska law before the *Flamme* decision. The rather casual introduction of "negligent misrepresentation" as a cause of action in Nebraska is attributable to the majority's failure to mention the elements of actionable misrepresentation, before and after the *Flamme* decision. Today's innovation for Nebraska, recognition of actionable negligent misrepresentation, is appropriately described by paraphrase of a Churchillian characterization: This court has stumbled over the newly expanded cause of action for negligent misrepresentation, but hastily picked itself up and hurried on as if nothing had happened. On the other hand, if aware of the *Flamme* consequences, this court is regrettably reticent about enunciating an innovation which will undoubtedly have a substantial impact on causes of action for fraudulent misrepresentation in Nebraska.

Before today, deceit or recklessness was necessary for actionable fraudulent misrepresentation. As we stated in *Edwin Bender & Sons v. Ericson Livestock Comm. Co.*, 228 Neb. 157, 165-66, 421 N.W.2d 766, 771 (1988):

> To recover in an action for fraud based on a misrepresentation of fact, a plaintiff must prove that (1) the defendant made a representation of a material fact; (2) the representation was false; (3) the representation, when made, was known to be false or was made recklessly as a positive assertion without knowledge concerning the truth of the representation; (4) the representation was made

> with the intention that the plaintiff would rely on it; (5) the plaintiff reasonably relied on the representation; and (6) as the result of such reliance, the plaintiff suffered damage.

See, also, *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

In *Edwin Bender & Sons, supra*, a jury question existed, when, in connection with Bender's purchase of heifers, Ericson, without knowledge of the heifers' condition, represented to Bender that the cattle were "open," i.e., not pregnant, whereas the cattle were pregnant, which resulted in damages to Bender, who had relied on the misrepresentation as an inducement for the sale. In a similar vein, an actor's statement of fact, made in the absence of knowledge, has satisfied the element of "recklessness" necessary for actionable fraud by misrepresentation of a material fact. See, *Willard v. Key*, 83 Neb. 850, 120 N.W.2d 419 (1909) (an actor, without knowing the number of acres in a parcel of real estate, represented an incorrect acreage); *Campbell v. C & C Motor Co.*, 146 Neb. 721, 21 N.W. 427 (1946) (a statement made without knowledge of truth is made recklessly).

Nevertheless, the plain fact is that for quite some time this court has endeavored, and at times has struggled, to characterize as "recklessness" that conduct which is more appropriately within the boundaries of "negligence."

As Prosser has noted, "A representation made with an honest belief in its truth may still be negligent, because of lack of reasonable care in ascertaining the facts, or in the manner of expression, or absence of the skill and competence required by a particular business or profession." Prosser and Keeton on the Law of Torts, *Misrepresentation and Nondisclosure* § 107 at 745 (5th ed. 1984).

In *Springdale Gardens v. Countryland Dev., Inc.*, 638 S.W.2d 813, 816 (Mo. App. 1982), the court observed:

> The elements of negligent misrepresentation differ from those of fraudulent misrepresentation in one major respect: while the latter requires proof that the defendant knew the statement was untrue or was reckless as to whether the statements were true or false, the former

> merely requires proof that the defendant failed to exercise reasonable care or competence to obtain or communicate true information.

See, also, Restatement (Second) of Torts § 552, comment *a.* (1977) (unlike fraudulent misrepresentation, negligent misrepresentation imposes liability when there is good faith, i.e., absence of an intent to deceive, coupled with negligence).

The tort of negligent misrepresentation was recognized in *Ryan v. Kanne*, 170 N.W.2d 395 (Iowa 1969), when the Iowa Supreme Court decided that "an accountant should be liable in negligence for careless financial misrepresentation relied upon by actually foreseen and limited classes of persons." *Id.* at 402. In *Ryan*, the court also "recognize[d] that the same rule may be applicable in other recognized professions, such as abstracters and attorneys." *Id.* Later, in *Beeck v. Kapalis*, 302 N.W.2d 90, 97 (Iowa 1981), the Iowa Supreme Court set out the elements for a recovery based on negligent misrepresentation by one who is engaged in a profession or business involving dissemination of information:

> "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information. . . ."

Furthermore, Iowa is not alone in recognizing a cause of action for negligent representation. See, *Guardian Const. v. Tetra Tech Richardson*, 583 A.2d 1378 (Del. 1990); *Gilliland v. Elmwood Properties*, 301 S.C. 295, 391 S.E.2d 577 (1990); *Lund v. North Dakota State Highway Dept.*, 403 N.W.2d 25 (N.D. 1987); *Duffy v. Brown*, 708 P.2d 433 (Wyo. 1985); *State Bank of Townsend v. Maryann's, Inc.*, 204 Mont. 21, 664 P.2d 295 (1983); *Moore v. Kluthe & Lane Ins. Agency*, 89 S.D. 419, 234 N.W.2d 260 (1975); *Broderick Inv. v. Strand Nordstrom et al.*, 794 P.2d 264 (Colo. App. 1990); *Springdale Gardens v. Countryland Dev., Inc., supra*. See, also, Restatement (Second) of Torts § 552 (1977).

Consequently, a cause of action for negligent representation is a realistic and logical development of Nebraska law. However, the majority should have emphasized the change in Nebraska law and thereby provided clarity and direction, not confusion from uncertainty, pertaining to actionable misrepresentation. For example, concerning "fraudulent misrepresentation," NJI2d 9.01 refers to a representation made either with knowledge that the representation is false or made recklessly as a positive assertion in the absence of the actor's knowledge concerning the represented fact. See, also, NJI2d 15.08 (definition of fraudulent representation). Obviously, "recklessness," as a disregard for consequences, is quite different from "negligence," the lack of reasonable care. Hence, today's decision blurs some of the law governing actions for misrepresentation of a material fact. Also, admissibility of evidence may now be considered in light of the law on negligence rather than the more restrictive standard required for "recklessness."

Nonetheless, while there may still be cases based on deceit or recklessness in reference to misrepresentation of a material fact, this court has correctly chosen to also allow recovery for negligent misrepresentation as a cause of action in Nebraska.

STATE OF NEBRASKA, APPELLEE, V. TONY L. HAYNIE, APPELLANT.

476 N.W.2d 905

Filed November 15, 1991. No. 90-453.

1. **Police Officers and Sheriffs: Arrests: Probable Cause.** When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant. The key to a lawful arrest without a warrant is reasonable or probable cause to believe that a person has committed a crime.
2. _____: _____: _____. A peace officer has statutory authority to arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed a felony.
3. _____: _____: _____. Neb. Rev. Stat. § 29-404.03 (Reissue 1989) provides

that in determining whether reasonable cause exists to justify an arrest, a law enforcement officer may take into account all facts and circumstances, including those based upon any expert knowledge or experience which the officer in fact possessed, which a prudent officer would judge relevant to the likelihood that a crime has been committed and that the person to be arrested has committed it, and for such purpose the officer may rely on information he receives from any informant whom it is reasonable under the circumstances to credit, whether or not at the time of making the arrest the officer knows the informant's identity.

4. _____: _____: _____. Neb. Rev. Stat. § 29-404.03 (Reissue 1989) provides that an anonymous tip may be considered along with other facts and circumstances to determine reasonable cause.
5. **Constitutional Law: Search and Seizure: Arrests: Probable Cause.** Under certain circumstances an anonymous letter can provide probable cause requisite to a search warrant, and the fourth amendment to the U.S. Constitution makes no distinction in the standards applicable to a determination of probable cause for arrest and probable cause for search and seizure.
6. **Probable Cause: Warrants.** It is necessary to examine the totality of the circumstances for determining whether an informant's tip establishes probable cause for issuance of a warrant.
7. **Constitutional Law: Search and Seizure: Arrests: Probable Cause.** Anonymous tips, particularly when supplemented by independent police investigation, frequently contribute to the solution of otherwise "perfect crimes." While a conscientious assessment of the basis for crediting such tips is required by the fourth amendment, a standard that leaves virtually no place for anonymous citizen informants is not.
8. **Search and Seizure: Arrests: Probable Cause.** When considering the sufficiency of probable cause based on information supplied by an informant, it is important to distinguish the police tipster, who acts for money, leniency, or some other selfish purpose, from the citizen informer, whose only motive is to help law officers in the suppression of crime. Reliability still must be shown, but it may appear by the very nature of the circumstances under which the incriminating information became known.
9. **Confessions: Evidence: Proof.** A statement of a suspect, to be admissible, must be shown by the State to have been given freely and voluntarily and not to have been the product of any promise or inducement—direct, indirect, or implied—no matter how slight. However, this rule is not to be applied on a strict, per se basis. Rather, determinations of voluntariness are based upon an assessment of all of the circumstances and factors surrounding the occurrence when the statement is made.
10. **Confessions: Proof.** Some of the material considerations in determining the voluntariness of statements made by defendants in the context of inducements by prosecuting authorities include whether (1) defendant is in custody at the time of the statement, (2) defendant is alone and unrepresented by counsel, (3) the promise or inducement is initiated by prosecuting officials as opposed to defendant or someone acting on his or her behalf, (4) defendant is aware of his or

her constitutional and other legal rights, (5) the potentially incriminating statement is part of an abortive plea bargain, (6) the promise or inducement leading to the statement is fulfilled by prosecuting authorities, and (7) defendant is subjected to protracted interrogation or evidence appears on the record to show that coercion precludes the statement from being knowing and intelligent.

11. **Confessions: Appeal and Error.** Whether a defendant's statements resulted from an officer's promise is a question of fact. In determining whether the findings made by the trial court in that regard are clearly wrong, the Supreme Court takes into consideration that the trial court observed the witnesses testify during the hearing.
12. _____: _____. Voluntariness of an admission or confession is determined by the totality of the circumstances, and a determination by the trial court that a confession was made voluntarily will not be overturned on appeal unless clearly wrong.
13. **Confessions: Police Officers and Sheriffs: Due Process.** Coercive police conduct is a necessary predicate to the finding that a confession is not voluntary within the meaning of the due process clause of the 14th amendment.
14. **Sentences: Appeal and Error.** As a general rule, a sentence imposed within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion.
15. **Sentences.** Generally, it is within the trial court's discretion to direct that sentences imposed for separate crimes be served consecutively.
16. _____. In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime.
17. _____. It is the minimum portion of an indeterminate sentence which measures its severity.
18. _____. A sentence imposed on a criminal defendant ought not exceed the minimum period consistent with protection of the public, gravity of the offense, and rehabilitative needs of the defendant.
19. **Criminal Law.** One of the primary functions of the criminal law is to protect individuals and society from the depredations of the criminally bent.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed as modified.

Thomas M. Kenney, Douglas County Public Defender, and Timothy P. Burns, and Phillip G. Wright for appellant.

Don Stenberg, Attorney General, and Elaine A. Chapman for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Defendant, Tony L. Haynie, appeals from the bench trial convictions of six counts of robbery and one count of attempted robbery and his sentences to consecutive terms of imprisonment totaling not less than 68 nor more than 185 years. He assigns as error the admission of his confession into evidence and the excessiveness of the sentences.

Thirteen robberies had occurred in Omaha in which the suspect had been identified as a tall and slender black male around 20 years of age with short hair. The suspect was reported to have a red eye and used a cloth covering over his arm to conceal an alleged weapon. An anonymous tip was provided naming the defendant as the alleged robber. The anonymous caller described the defendant as a thin 28-year-old black male, 6 feet 1 inch tall, with short hair. According to the caller the suspect was unemployed, but had large sums of money and had told friends that he was going to rob 7 Eleven stores to pay for drugs. Robberies had in fact occurred at a 7 Eleven store, a Goodrich Dairy store, and doughnut, pharmacy, and grocery stores, and a robbery had been attempted at a Kwik Shop. The caller said that the suspect had a red eye as a result of a fight with "Crips," was known as Tony and Slim, and could be found occasionally at 4226 Wirt Street.

Police officers who had investigated the robberies reported that the suspect was unemployed, but had money and used crack cocaine. Following receipt of the anonymous tip a general police broadcast was issued for Haynie's arrest. The defendant was not found at the Wirt Street address, but neighbors described a car in which they had seen Haynie. After a police officer located the car, the defendant was found at a residential address and arrested. The defendant was advised of his constitutional rights and indicated that he was willing to make a statement. The defendant then confessed to committing 13 robberies. The interrogating officer denied that he made any promises or threats in exchange for the defendant's statement, but said that he told the defendant during the questioning that he would make a report and indicate that the defendant talked freely, without any hesitation, and that would probably be taken into consideration on how many cases were filed against

him. The defendant in fact was 6 feet 3 inches tall, weighed 172 pounds, was 29 years of age, and had a red eye when he was arrested.

Defendant made a pretrial motion to suppress all statements made by him to police officers because they were not freely and voluntarily made, were coerced by threats and promises, and were the fruit of an unlawful arrest. The motion was overruled, the defendant waived his right to a jury trial, and the parties stipulated that the police reports would be the only evidence adduced at trial. However, defendant renewed his objection to the admission of his statement. Other than the claimed excessiveness of the sentences, this is the only issue in dispute. The presentence investigation report revealed that the defendant had been fined $25 in 1985 for a welfare fraud conviction. The trial court noted that in most of the robberies the defendant told the victims that he had a gun. Following trial and conviction the defendant was sentenced as previously noted.

We first deal with defendant's claim that his arrest was not lawful and therefore any confession was the "fruit of the poisonous tree."

When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant. The key to a lawful arrest without a warrant is reasonable or probable cause to believe that a person has committed a crime. *State v. Badami*, 235 Neb. 118, 453 N.W.2d 746 (1990).

According to Neb. Rev. Stat. § 29-404.02 (Reissue 1989), a peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed a felony. Reasonable cause is explained in Neb. Rev. Stat. § 29-404.03 (Reissue 1989) as follows:

> In determining whether reasonable cause exists to justify an arrest, a law enforcement officer may take into account all facts and circumstances, including those based upon any expert knowledge or experience which the officer in fact possessed, which a prudent officer would

> judge relevant to the likelihood that a crime has been committed and that the person to be arrested has committed it, and for such purpose the officer may rely on information he receives from any informant whom it is reasonable under the circumstances to credit, whether or not at the time of making the arrest the officer knows the informant's identity.

According to § 29-404.03 an anonymous tip may be considered along with other facts and circumstances. The U.S. Supreme Court has held that an anonymous letter can provide the probable cause requisite for a search warrant. See *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). The fourth amendment to the U.S. Constitution makes no distinction in the standards applicable to a determination of probable cause for arrest and probable cause for search and seizure. *State v. Dussault*, 193 Neb. 122, 225 N.W.2d 558 (1975). *Gates* is therefore relevant to the case at bar, even though it concerned probable cause requisite for a search warrant rather than for an arrest.

The Court in *Gates* rejected the rigid test of veracity or reliability and basis of knowledge and adopted the totality-of-the-circumstances test for determining whether an informant's tip establishes probable cause for issuance of a warrant. The Court noted that an informant's veracity, reliability, and basis of knowledge are all highly relevant in determining the value of the report, but that they should not be viewed as entirely separate and independent requirements to be rigidly exacted in every case. A deficiency in one may be compensated for by a strong showing as to the other. The Court explained that probable cause is a fluid concept dependent on the assessment of probabilities in particular factual contexts which cannot be reduced to a neat set of legal rules. The Supreme Court recognized the following regarding anonymous citizen informants:

> [Anonymous] tips, particularly when supplemented by independent police investigation, frequently contribute to the solution of otherwise "perfect crimes." While a conscientious assessment of the basis for crediting such tips is required by the Fourth Amendment, a standard that

> leaves virtually no place for anonymous citizen informants is not.

Illinois v. Gates, supra at 462 U.S. at 237-38.

The Nebraska Supreme Court has further explained the following concerning probable cause for a warrantless arrest based on information from an informant:

> " 'When considering the sufficiency of probable cause based on information supplied by an informant, it is important to distinguish the police tipster, who acts for money, leniency, or some other selfish purpose, from the citizen informer, whose only motive is to help law officers in the suppression of crime.
>
> . . . .
>
> " 'In the latter the rule of prior reliability is considerably relaxed for several reasons. In the first place the citizen informer has rarely had any earlier experience in reporting suspected criminal activity. Furthermore, unlike the professional informant, he is without motive to exaggerate, falsify or distort the facts to serve his own ends.
>
> " 'Reliability still must be shown, but it may appear by the very nature of the circumstances under which the incriminating information became known. Any other rule would lead to the totally unacceptable result that public-spirited citizens interested only in law enforcement could seldom furnish information sufficient to establish probable cause.' . . ."

State v. Blakely, 227 Neb. 816, 822-23, 420 N.W.2d 300, 304-05 (1988).

The defendant contends that there was a wide variation in the descriptions of the robbery suspect provided to the police officers. The descriptions of the suspect as a man between 20 and 30 years old and varying from 5 feet 5 inches to 6 feet 2 inches tall and from 120 to 155 pounds were not that much of a variation from the actual physical characteristics of the defendant previously mentioned. With the addition of the "red eye" description and the independent investigation by the police officers, there certainly was probable cause to believe that the defendant was the man who had been committing these

robberies.

The more perplexing question deals with the issue of voluntariness. Haynie points out that the State must show that the statement, admission, or confession of the accused was given freely and voluntarily and was not the product of any promise or inducement, direct or implied, *no matter how slight*, before it will be admitted into evidence. *State v. Hall*, 237 Neb. 169, 465 N.W.2d 150 (1991).

The basis of the "no matter how slight" rule in Nebraska apparently was first identified in *State v. Mayhew*, 216 Neb. 761, 765, 346 N.W.2d 236, 239 (1984), wherein this court said:

> The holding that any inducement made by a person in authority to a person charged with a crime to obtain a statement or confession will render that statement or confession not voluntary and therefore inadmissible has been long established in our law. In *Bram v. United States*, 168 U.S. 532, 542-43, 18 S. Ct. 183, 42 L. Ed. 568 (1897), the Supreme Court of the United States quoted with approval from a textbook stating: " 'But a confession, in order to be admissible, must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight . . . .' "

This court has restated this rule many times in opinions following *Mayhew*, to the point where it almost appears to be a per se rule. However, that is not the case.

Tippitt v. Lockhart, 859 F.2d 595 (8th Cir. 1988), *cert. denied* 490 U.S. 1100, 109 S. Ct. 2452, 104 L. Ed. 2d 1007 (1989), involved an in-custody statement by a suspect in an aggravated robbery and attempted capital murder case wherein the defendant gave a written statement in which he admitted he was the driver of the getaway car. Two of defendant's accomplices were charged with aggravated robbery and attempted capital murder. The officers who had arrested defendant promised not to charge him with attempted capital murder in return for his statement. He was given the *Miranda* warnings, following which he gave a statement which was used against him at his trial on charges of aggravated robbery and theft. As promised, he was not charged with attempted capital murder.

In finding that subsequent cases have not applied the *Bram* standard literally, the *Tippitt* court cited the following from *United States v. Grant*, 622 F.2d 308, 316 (8th Cir. 1980):

> While the *Bram* test has long been followed, it has not been interpreted to be applied on a strict, *per se* basis. [Citations omitted.] Rather, as expressed by the Supreme Court, determinations of voluntariness are based upon an assessment of all of the circumstances and factors surrounding the occurrence when the statement is made. [Citations omitted.] This flexible standard allows for judicial determinations of voluntariness in myriad situations without such decision making being hampered by rigid and potentially artificial restraints. The "totality of the circumstances" inquiry requires the reviewing court to investigate and analyze "both the characteristics of the accused and the details of the interrogation." [Citation omitted.]

The *Tippitt* court also cited the following from *United States v. Ferrara*, 377 F.2d 16, 17 (2d Cir. 1967), *cert. denied* 389 U.S. 908, 88 S. Ct. 225, 19 L. Ed. 2d 225:

> That language [from *Bram*] has never been applied with the wooden literalness urged upon us by appellant. The Supreme Court has consistently made clear that the test of voluntariness is whether an examination of all the circumstances discloses that the conduct of "law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined * * *." [Citations omitted.]

The *Tippitt* court concluded that the *Bram* language had not been and should not be interpreted to require the exclusion of a statement given in exchange for a promise not to prosecute for an additional crime. The court noted that such a holding would be in conflict with the well-established rule that the totality of the circumstances must be considered in determining whether the confession was the result of overbearing by the police authorities. The court concluded that such a promise is merely one of the circumstances to determine whether the statement was freely and voluntarily given. Although the present case does not concern an admission given as a result of a plea

bargain agreement, the interrogating officer's statement regarding the probable consideration of cooperation in determining the number of charges to be filed should likewise be merely one of the circumstances which determine whether the defendant's statement was freely and voluntarily given.

A nonexhaustive list of potentially material considerations in determining the voluntariness of statements in the context of inducements by prosecuting authorities includes whether (1) defendant is in custody at the time of the statement, (2) defendant is alone and unrepresented by counsel, (3) the promise or inducement is initiated by prosecuting officials as opposed to defendant or someone acting on his behalf, (4) defendant is aware of his constitutional and other legal rights, (5) the potentially incriminating statement is part of an abortive plea bargain, (6) the promise or inducement leading to the statement is fulfilled by prosecuting authorities, and (7) defendant is subjected to protracted interrogation or evidence appears on the record to show that coercion precludes the statement from being knowing and intelligent. *United States v. Williams*, 447 F. Supp. 631 (D. Del. 1978). The *Williams* court concluded that the totality of circumstances must be examined in order to evaluate the voluntariness of an induced confession and that adherence to a per se suppression doctrine is unsatisfactory.

Tippitt v. Lockhart, 859 F.2d 595, 598 (8th Cir. 1988), concluded: "After considering the age and education of appellant, and the nature and extent of the interrogation, we conclude that the written confession given by appellant was the product of his rational and voluntary decision and that the officers' promise did not coerce or overbear his free will."

Upon the determination that the "however slight" rule is not a per se rule, it is apparent that whether a defendant's statements resulted from an officer's promise is a question of fact. We have said in the past that in reviewing the decision of the trial court in this respect, we will not reverse that decision unless it was clearly wrong and, on the other hand, that a finding that a confession was voluntarily made will not be overturned on appeal absent an abuse of discretion. See *State v. Hall*, 237 Neb. 169, 465 N.W.2d 150 (1991). These statements

laid side by side are obviously conflicting, but are simply repetitive of similar statements made in earlier cases.

We take this opportunity to set forth what we perceive to be the correct rule, and that is that a determination by the trial court that a statement was made voluntarily will not be disturbed on appeal unless clearly wrong. See *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983). See, also, *State v. Hall, supra*.

Although not cited as authority, the reasoning of Justice Boslaugh in his one-judge opinion *State v. Muenchau and Brown*, 209 Neb. 552, 308 N.W.2d 824 (1981), is quite compelling. He states at 554, 308 N.W.2d at 825-26:

> At the suppression hearing, [Deputy] Marker testified that "John [Brown] was told the same thing that we tell anyone else that comes in. We cannot promise him that he will have a lighter sentence, that anything will happen, that normally when a person cooperates with the court, that the court takes that into consideration."

The case *State v. Smith*, 203 Neb. 64, 66, 277 N.W.2d 441, 443 (1979), where a juvenile was told by an officer that "if the defendant cooperated with the police he would attempt to have the matter transferred to juvenile court," was distinguished in the opinion of Justice Boslaugh. He said, "Here no such benefit was offered to the appellee in return for making a statement. The fact that the defendant had 'cooperated' by giving a statement to the deputy sheriff would be readily apparent to the county attorney." 209 Neb. at 555, 308 N.W.2d at 826.

Cited in *State v. Muenchau and Brown, supra*, was the case *People v. Higgins*, 50 Ill. 2d 221, 278 N.E.2d 68 (1972), *cert. denied* 409 U.S. 855, 93 S. Ct. 195, 34 L. Ed. 2d 100. We quote again the language of Justice Boslaugh from the *Muenchau and Brown* opinion:

> In *Higgins*, the defendant and several other persons, including his sister, were arrested as suspects in the shooting death of a woman. In the course of a conversation with a police detective, defendant, in response to a question from the detective, asked: " 'If I tell the truth would you let the other people go?' Detective Davis answered that he had no authority to release anyone

> who was arrested and charged and that only the State's Attorney or judge could do so, but that, if defendant told the truth, the State's Attorney would take this into consideration." [Citation omitted.] The Illinois Supreme Court found that these remarks did not render defendant's subsequent inculpatory statement involuntary.

209 Neb. at 555, 308 N.W.2d at 826.

In *State v. Thomas*, 232 Neb. 490, 441 N.W.2d 186 (1989), the defendant, after being read his rights, was told by the interrogating officer that he was facing a possible jail sentence and if the defendant revealed the source of the marijuana, there might be a possibility that it could help him when he appeared in court. Although the defendant did not provide the name of the supplier to the police, he moved to suppress statements he made to officers on the basis that they were elicited by improper inducements. The court found that the officer's comment that the revealing of the defendant's source might possibly help him when he appeared in court did not warrant an overturning of the district court's finding that the defendant's statement was voluntarily made. *Thomas* is similar to the instant case in that the interrogating officer in *Thomas* said there was a *possibility* that revealing the source might help the defendant, and here, the interrogating officer said that the defendant's cooperation would *probably* be taken into consideration as to how many cases were filed. In both cases the interrogating officers did not have authority to help the defendant, and neither officer made a promise of assistance, but speculated as to the effect of the defendant's cooperation.

In *State v. Porter*, 235 Neb. 476, 455 N.W.2d 787 (1990), the primary interrogator told the defendant that it could help him if he confessed and that it would look better for him if he confessed. At one point the interrogator said that he was *sure* the judge would take that into consideration. The court held that the interrogator's statements constituted implied promises of leniency which rendered the defendant's confession involuntary. *Porter* is distinguishable from the case at bar in that the interrogator was sure that a statement would be taken into consideration, whereas in the case at bar the officer referred only to a *probability* of a reduction in the number of

cases filed.

Coercive police conduct is a necessary predicate to the finding that a confession is not voluntary within the meaning of the due process clause of the 14th amendment. *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989). There is no evidence of coercive police conduct in the present case.

After considering the age, education, experience, and mental capabilities of the defendant, and the nature and extent of the interrogation, we conclude that the trial court was not clearly wrong in concluding that the confession given by the defendant was the product of his rational and voluntary decision and that the officer's rather innocuous statement that his report would indicate that defendant talked freely, which *probably* would be taken into consideration on how many cases were filed against him, did not coerce or overbear the defendant's free will.

We deal next with defendant's claim that the sentences imposed were excessive. Robbery is a Class II felony according to Neb. Rev. Stat. § 28-324 (Reissue 1989), which authorizes a maximum sentence of imprisonment of 50 years and a minimum sentence of 1 year. Attempted robbery is a Class III felony with a prescribed sentence of not more than 20 years nor less than 1 year. The sentences on the six robbery counts were respectively 5 to 10 years, 7 to 15 years, 9 to 20 years, 11 to 25 years, 15 to 50 years, and 15 to 50 years and on the attempted robbery, 6 to 15 years, with all sentences to run consecutively to each other. As earlier stated, these amounted to a total sentence of a minimum of 68 and a maximum of 185 years. The sentences imposed were within the statutorily prescribed limits.

As a general rule, a sentence imposed within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion. *State v. Nevels*, 235 Neb. 39, 453 N.W.2d 579 (1990). It is also within the trial court's discretion to direct that sentences imposed for separate crimes be served consecutively. *State v. Zaritz*, 235 Neb. 599, 456 N.W.2d 479 (1990).

In imposing a sentence, a sentencing judge should consider the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the

offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Nevels, supra.* "Moreover, it is the minimum portion of an indeterminate sentence which measures its severity." *Nevels, supra* at 53, 453 N.W.2d at 588. Thus the important prong of the sentence is the minimum sentence of 68 years. In light of the defendant's age and insignificant prior criminal record, it is relevant to note that a sentence of imprisonment ought not exceed the minimum period consistent with protection of the public, gravity of the offense, and rehabilitative needs of the defendant. See *State v. Sturm*, 189 Neb. 299, 202 N.W.2d 381 (1972). Also, it is important to consider the rehabilitative needs of the defendant in sentencing, such as his or her addiction to narcotic drugs. One of the primary functions of the criminal law is to protect individuals and society from the depredations of the criminally bent. *State v. Etchison*, 188 Neb. 134, 195 N.W.2d 498 (1972).

It is difficult to color-match cases when reviewing the terms of sentences. Nevertheless, it is helpful to examine cases in which this court has reduced sentences.

In *State v. Sturm, supra*, the defendant, although admittedly abused by her husband, nevertheless waited until after he went to bed and had fallen asleep, and then she got a 12-gauge shotgun, loaded it with two shells, walked upstairs and into her husband's bedroom, and fired a shot at him from a distance of 8 feet. When he bolted upright, she shot him again.

As stated in the dissenting opinion, in which two other justices joined, the county attorney saw fit only to charge the defendant with second degree murder. The jury saw fit to convict the defendant of manslaughter.

The penalty for manslaughter at that time was imprisonment for not less than 1 nor more than 10 years. The trial court imposed a flat sentence of 10 years, which in effect was 1 to 10 years. This court, although commenting on the lapse of time between the alleged violence against the defendant by her husband and the fact that she waited until he had gone to sleep before shooting him, also pointed to mitigating circumstances including the husband's prior brutality and the defendant's great emotional disturbance, and found the sentence to be excessive. The court reduced the sentence to 5 years, which

amounted to imprisonment for not less than 1 nor more than 5 years. The court further commented, "A sentence to imprisonment ought not exceed the minimum period consistent with protection of the public, gravity of the offense, and rehabilitative needs of the defendant." *State v. Sturm, supra* at 302, 202 N.W.2d at 382.

In *State v. Foutch*, 196 Neb. 644, 244 N.W.2d 291 (1976), the court reduced defendant's sentence of 3 to 9 years' imprisonment for assault with intent to inflict great bodily injury on a 4-year-old child to 1 to 3 years. The defendant, the boyfriend of the child's mother for a period of 1 year, kicked the child for disobedience. As a result of the kick the child fractured his leg when either an electric fan fell on him or he was kicked into the fan. The court noted that defendant was 26 years of age with no prior record and that he did not represent a threat to the community.

State v. Burkhardt, 194 Neb. 265, 231 N.W.2d 354 (1975), involved a sentence of imprisonment of from 2 to 6 years for grand larceny which was reduced to a term of 1 to 3 years. The defendant's accomplice received 2 years' probation. The defendant was 19 years of age, his accomplice 18 years old, and neither had a prior felony record, but both had juvenile records. The defendant, unlike his accomplice, had a history of drug use.

The defendant in *State v. Stuggett*, 200 Neb. 693, 264 N.W.2d 876 (1978), had been sentenced to a term of imprisonment of 30 years for second degree murder, which was reduced by this court to 15 years. The conviction arose out of a fight in which the victim struck the defendant, who then retaliated by stabbing the victim in the chest three times. The court found the murder, although serious, was unplanned and provoked by the victim. The court concluded that the reduction of the sentence from 30 years to 15 years was consistent with protection of the public, gravity of the offense, and rehabilitative needs of the defendant.

This court has no Ouija board, nor do we possess any degree of prescience beyond that of sentencing judges. However, we do have the benefit of examination of sentences from many courts throughout this state for a variety of crimes and under diverse

circumstances, in which no opinions are written or published. Realizing, as we have stated, that a sentence ought not be longer than is necessary for rehabilitation and protection of society and that it is the minimum portion of an indeterminate sentence which measures its severity, we find that the minimum term of 68 years is substantially more than is necessary for rehabilitative purposes, is an obstacle so as to discourage the defendant from attempting rehabilitation, and is more than is necessary for the protection of society. To that extent the sentences constitute an abuse of discretion.

Based on the foregoing facts, law, and reasoning, we modify the judgment of the district court to provide that the defendant shall be sentenced to serve terms of imprisonment in an institution under the control of the Department of Correctional Services of 5 to 10 years on each of counts I, II, III, and IV, to be served consecutively to each other; of 5 to 25 years on each of counts V and VI, to be served concurrently with each other, but consecutively to the sentences on counts I, II, III, and IV; and of 5 to 15 years on count VII, to be served consecutively to the sentences on counts I to VI. This reduces the total of the sentences to a term of not less than 30 nor more than 80 years.

The judgment of the district court, as so modified, is affirmed.

AFFIRMED AS MODIFIED.

SHANAHAN, J., concurring.

Concerning voluntariness necessary for constitutional admissibility of a criminal defendant's confession or inculpatory statement, the U.S. Supreme Court observed in *Culombe v. Connecticut*, 367 U.S. 568, 602, 81 S. Ct. 1860, 6 L. Ed. 2d 1037 (1961):

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

Accord, *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985). Also, as expressed in *Miller v. Fenton*, 474 U.S. 104, 109-10, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985):

> This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment. . . . Although these decisions framed the legal inquiry in a variety of different ways, usually through the "convenient shorthand" of asking whether the confession was "involuntary," *Blackburn v. Alabama*, 361 U.S. 199, 207 [80 S. Ct. 274, 4 L. Ed. 2d 242] (1960), the Court's analysis has consistently been animated by the view that "ours is an accusatorial and not an inquisitorial system," *Rogers v. Richmond*, 365 U.S. 534, 541 [81 S. Ct. 735, 5 L. Ed. 2d 760] (1961), and that, accordingly, tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment's guarantee of fundamental fairness.

Since the other members of this court have expressed dichotomous opinions regarding constitutional admissibility of Haynie's statements, the record in Haynie's case seems to be a good starting point for any analysis.

Before Haynie's arrest, Omaha police had been investigating a series of 13 robberies during the fall of 1989. Police reports on those robberies contained eyewitnesses' meticulous descriptions of the robber, who "had a red [bloodshot] eye and used the same type of cover over his hand [for concealment of a weapon] to do the robberies . . . ." Witness accounts supplied a "[p]hysical description of [the robber], his height, and his weight and age." When Haynie was brought to the police station for interrogation, the interrogating officer administered the *Miranda* warning or admonition and, at commencement of the interview, said that "[Haynie] was the one responsible for [the robberies], given the physical description of the suspect and the red eye of the suspect, which [Haynie] had at that time." The

officer proceeded to interrogate Haynie and, in the course of the interrogation, told Haynie that the officer "would make a report and indicate that [Haynie] talked to us freely, without any hesitation, and that would probably be taken into consideration on how many cases they filed on him." The interrogating officer expressly denied telling Haynie that "it would go easier on him if he cooperated" and also denied stating that "if [Haynie] cooperated . . . there might be less charges filed against him." In the course of the interrogation, Haynie admitted committing at least 11 robberies which had been investigated by Omaha police. Seven of those investigated robberies were the bases for charges on which Haynie was eventually tried and convicted. Haynie offered no evidence on voluntariness of his statements made during the interrogation. Among its conclusions, the district court found that Haynie's inculpatory statements were voluntary and, consequently, were admissible evidence on the question of Haynie's guilt for the robberies charged.

Regarding requisite voluntariness for constitutional admissibility of a defendant's statement, LaFave and Israel have observed:

> Viewing the voluntariness test in terms of its underlying values, then, it may be said that the objective of the test is to bar admission of those confessions (i) which are of doubtful reliability because of the practices used to obtain them; (ii) which were obtained by offensive police practices even if reliability is not in question (for example, where there is strong corroborating evidence); or (iii) which were obtained under circumstances in which the defendant's free choice was significantly impaired, even if the police did not resort to offensive practices.

1 W. LaFave & J. Israel, Criminal Procedure § 6.2 at 444 (West 1984).

That brings us to an examination of *Bram v. United States*, 168 U.S. 532, 18 S. Ct. 183, 42 L. Ed. 568 (1897), and its per se rule that a defendant's confession or inculpatory statement obtained by any direct or implied promise, however slight, vitiates voluntariness of the confession or statement, which is, therefore, rendered constitutionally inadmissible. Thus, *Bram*

reflects the necessity that a confession or statement must not be the result of a police promise or inducement to the defendant. Nevertheless, for quite some time, permissible police conduct in obtaining a defendant's confession or inculpatory statement has been evaluated through "an examination of all the attendant circumstances," see *Haynes v. Washington*, 373 U.S. 503, 513, 83 S. Ct. 1336, 10 L. Ed. 2d 513 (1963), or, as noted by LaFave and Israel:

> Under the Fourteenth Amendment due process voluntariness test, the Supreme Court has undertaken over the years a continuing re-evaluation on the facts of each case of how much pressure is constitutionally permissible in obtaining a confession. This rule, then, requires examination of the "totality of circumstances" surrounding each confession. As a general matter, this means that it is necessary to assess carefully the characteristics and status of the person who gave the confession and also the conduct of the police in obtaining it. This is not to suggest, however, that the Court has deemed it necessary to follow this approach in all cases. If the conduct of the police was "inherently coercive," then suppression in the interest of deterring such conduct in future cases is appropriate without first making any judgment about the impact of that conduct upon the particular defendant. But when the question comes down to whether *this* defendant's free choice was substantially impaired, then any facts which tend to show that he is more or less susceptible to pressures than the average person are particularly relevant.

(Emphasis in original.) 1 W. LaFave & J. Israel, *supra* at 444.

In *People v Conte*, 421 Mich. 704, 365 N.W.2d 648 (1985), the Supreme Court of Michigan considered the issue whether a defendant's inculpatory statement is inadmissible if induced by a law enforcement officer's promise of leniency and adopted a test which is "more consonant with the law and logic," namely:

> [A] statement induced by a law enforcement official's promise of leniency is involuntary and inadmissible, if there was a promise of leniency and that promise caused the defendant to confess. In determining whether a

> promise of leniency exists, the relevant inquiry is whether the defendant reasonably understood the official's statements to be a promise of leniency. In determining whether that promise caused the defendant to confess, we will ask whether the promise was one relied upon by the defendant in making his decision to offer inculpatory statements, and whether it was one that prompted him in fact to give those statements. If the answer to all of the foregoing inquiries is affirmative, the defendant's statements are involuntary and inadmissible. If the answer to any of the questions is negative, the defendant's statements are admissible.

421 Mich. at 712, 365 N.W.2d at 650.

In *Conte*, the court noted:

> Most authorities acknowledge that promises of leniency can render a confession involuntary and inadmissible. . . . The real question is under what circumstances will a promise of leniency render a confession involuntary. More particularly, the issue is whether, in determining the voluntariness of a confession, a promise of leniency is merely one of many factors to consider . . . or, whether a promise of leniency which alone induces a confession is sufficient to render the confession involuntary.

421 Mich. at 724-25, 365 N.W.2d at 655-56. Continuing in *Conte*, the court adopted a test which

> comports with both the law of confessions and the law specifically relating to confessions induced by a promise of leniency. That test embodies elements of both the per se rule and the totality rule and holds that a confession induced by a law enforcement official's promise of leniency is involuntary and inadmissible.
>
> . . . [T]he next question is what are the parameters of that rule. In applying the rule, we must first determine whether a promise of leniency exists, and, second, whether the promise caused the confession.
>
> In determining whether the communication from the authorities to the defendant is sufficient to constitute a promise of leniency, we will focus upon defendant's state

> of mind. Thus, it is from defendant's perspective that we will view the alleged promises. [Citations omitted.] The inquiry will be whether the defendant is likely to have reasonably understood the statements in question to be promises of leniency. [Citations omitted.]
>
> Such an inquiry will necessarily depend upon the facts and circumstances in which the language is used. [Citations omitted.] Nonetheless, we wish to emphasize that mere adjurations or exhortations to tell the truth, without more, are insufficient to vitiate the voluntariness of a confession. [Citations omitted.] Such adjurations and exhortations are simply not promises. However, admonitions to tell the truth, coupled with other factors which could lead the defendant to believe that it is in his best interest to cooperate may amount to a promise of leniency. In addition, the promise need not be express, as subtle intimations can convey as much as express statements. . . .
>
> If from the above inquiry we determine that no promise of leniency was made, then we will pursue the matter no further. If, however, we conclude that a promise of leniency was in fact made, then we will proceed to ask whether that promise causally induced the defendant's confession.
>
> As in determining whether a promise exists, we will focus upon the defendant's state of mind to determine if that promise caused him to confess. [Citations omitted.] The promise, however, must have more than an attenuated causal connection with the confession, but need not be the only or even principal motivating factor. Rather, the promise must have been one relied upon by the defendant in making his decision and one that at least in part prompted the defendant to confess. [Citations omitted.]

421 Mich. at 739-41, 365 N.W.2d at 662-63.

Applying the *Conte* test to Haynie's case, the district court could well have concluded that (1) there was no promise of leniency to Haynie or other inducement for his inculpatory statements, or (2) if there was a promise of leniency or an

inducement, Haynie's statements were not the result of any promise or inducement; rather, the statements resulted from Haynie's realization that extensive police investigation into the robberies produced a substantial case against him and would likely culminate in his convictions for the robberies. In view of the record, neither of the foregoing conclusions is clearly erroneous; hence, the trial court's ruling on constitutional admissibility of evidence in Haynie's case is sustainable and must be affirmed, because the trial court's ruling is not clearly erroneous. See, *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983); *State v. Williams*, 205 Neb. 56, 287 N.W.2d 18 (1979).

Research indicates that no appellate court, state or federal, has held that an involuntary confession is constitutionally admissible in a criminal trial; rather, as expressed in *Jackson v. Denno*, 378 U.S. 368, 376, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964): "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession." Even in *Arizona v. Fulminante*, ____ U.S. ____, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), which is the U.S. Supreme Court's most recent decision involving voluntariness of a confession, the Court commenced its analysis based on the premise that a defendant's involuntary confession is constitutionally inadmissible. At issue in *Fulminante* was whether the erroneous admission of an involuntary confession may be considered under the harmless error standard. Therefore, a discussion about personal freedoms, which may be more restricted as a result of the Supreme Court's construction of the U.S. Constitution vis-a-vis perhaps less restricted personal freedoms under the Nebraska Constitution construed by this court, is premature and, therefore, unnecessary in Haynie's case.

The central question in Haynie's case is the voluntariness of his inculpatory statements. Whether Haynie's statements were voluntary was a matter initially for the trial court's determination based on the facts presented and eventually for this court's evaluation in light of the trial court's findings and conclusions, which are not clearly erroneous. Consequently, the decision of the trial court must be affirmed.

WHITE, J., dissenting.

For nearly 100 years the U.S. Supreme Court construed the fifth amendment as rendering inadmissible confessions " 'extracted by any sort of threats or violence, [or] obtained by any direct or implied promises, however slight . . . .' " *Bram v. United States*, 168 U.S. 532, 542-43, 18 S. Ct. 183, 42 L. Ed. 568 (1897); *Hutto v. Ross*, 429 U.S. 28, 97 S. Ct. 202, 50 L. Ed. 2d 194 (1976). The decisions of this court were in accord. See, *State v. Hall*, 237 Neb. 169, 465 N.W.2d 150 (1991); *State v. Mayhew*, 216 Neb. 761, 346 N.W.2d 236 (1984), citing *Bram, supra*.

In *Arizona v. Fulminante*, ____ U.S. ____, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991), the Supreme Court summarily discarded *Bram* as no longer stating the standard for determining the voluntariness of a confession. In its place the Supreme Court adopted the "totality-of-the-circumstances" approach relied upon by this court today.

This court has in the recent past implicitly concluded that the opinions of the U.S. Supreme Court define for both the federal Constitution and our own state Constitution the extent of the protections afforded persons accused of crime. After reaching its high water mark in such landmark cases as *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979), the Supreme Court has retreated from those positions, sometimes steadily, sometimes precipitously.

As I am unable to agree that today's holding is either sound constitutional doctrine or a desirable social policy, I abandon my previous limited adherence to the primacy of the U.S. Supreme Court in defining state constitutional rights and dissent.

In *State v. Favero*, 213 Neb. 718, 724, 331 N.W.2d 259, 263 (1983), I wrote:

> It may well be necessary, in view of the decisions of the U.S. Supreme Court which have considerably weakened the once absolute strictures of *Miranda*, for this Court to . . . formulate, as have a number of the states, a state

constitutional basis to deal with police conduct violative of *Miranda*.

See, also, *State v. Arnold*, 214 Neb. 769, 336 N.W.2d 97 (1983) (White, J., concurring) (addressing the same concerns for search and seizure cases). That day is here. Since the decision in *Favero*, the U.S. Supreme Court has continued to modify many of its prior decisions in the fourth, fifth, and sixth amendment contexts, severely limiting the protections afforded persons accused of crimes.

In the fourth amendment area, the Court has relaxed the requirements for the issuance of a search warrant based on an informant's tip to the police. At one time an officer seeking a warrant based on such information had to show some factual basis for the informant's knowledge, as well as facts establishing either the veracity of the informant or the reliability of the information in a particular case. See, *Aguilar v. Texas, supra*; *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). The Court abandoned this two-prong test, however, in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). Today, decisions whether probable cause exists to support issuance of a search warrant are based on a "totality-of-the-circumstances" approach. *Gates, supra* at 462 U.S. at 230. Though the approach is designed to remove unnecessary impediments to effective law enforcement, Justice White warned that the Court's new approach threatens to eviscerate the traditional probable cause standard. *Gates, supra* (White, J., concurring).

The Court has also significantly enhanced the power of the police to search automobiles without a warrant. In 1925, the Court held that a warrantless search of an automobile requires probable cause that evidence is contained therein and that exigent circumstances make it unlikely that the car or the evidence will still be available when a warrant is obtained. See *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925). Later, the Court engrafted an exception to the *Carroll* rule, allowing admission of evidence discovered during an inventory search of an automobile impounded for overtime parking to protect the owner's property. See *South Dakota v. Opperman*, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000

(1976). Finally, in *Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987), the Court extended *Opperman* to allow inventory searches of closed containers in impounded vehicles. So long as the search is conducted pursuant to standing police regulations and is not undertaken solely to discover evidence, the search is valid even if the owner is available, there is no threat of loss of the property, and there is no probable cause that incriminating evidence is located in the car. *Bertine, supra.*

The Court has also retreated from the rule that even minimally intrusive "stop and frisk" activities require at least an articulable suspicion that the subject is engaged in illegality. See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). In *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979), the Court held unconstitutional the random stopping of automobiles to check for valid operator's licenses. However, 11 years later the Court upheld the use of fixed checkpoints to check the sobriety of each driver passing through. See *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990). The *Sitz* Court reasoned that the magnitude of the drunk driving problem and the minimal intrusion on motorists' privacy justified departure from the articulable suspicion standard.

The balancing approach adopted by the *Sitz* Court has appeared in several other cases broadening the power of the police to engage in warrantless searches. See, *Treasury Employees v. Von Raab*, 489 U.S. 656, 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989) (suspicionless drug testing of Customs Service employees involved in drug interdiction activities or who carry a weapon is valid given compelling government interests involved); *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) (mandatory drug testing of railroad employees involved in certain accidents permissible under balancing approach); *Illinois v. Rodriguez*, ____ U.S. ____, 110 S. Ct. 2793, 111 L. Ed. 2d 148 (1990) (warrantless entry based on consent of third party whom police reasonably believe to possess common authority over the premises is valid, even if that person in fact lacks such authority).

The Court's move toward limiting the protections afforded persons accused of crime is not limited to the search and seizure area. Fifth and sixth amendment protections are eroding as well. A defendant's sixth amendment right to counsel is violated when the police "deliberately elicit" incriminating statements in the absence of an attorney. *Massiah v. United States*, 377 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964). In *United States v. Henry*, 447 U.S. 264, 100 S. Ct. 2183, 65 L. Ed. 2d 115 (1980), the Court reversed a conviction based in part on statements made to an informant paid by the police to listen for inculpatory remarks. Though the informant in *Henry* complied with strict instructions not to question the defendant regarding the charged crime, the Court nevertheless found that the informant deliberately elicited the statements by initiating casual conversation with the defendant. In *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S. Ct. 2616, 91 L. Ed. 2d 364 (1986), however, the Court unnecessarily reached out to decide that statements made to an informant placed in close proximity to the defendant, but who makes no effort to stimulate conversation, are admissible.

In the fifth amendment context, the Court, in the landmark case of *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), held that the giving of specific warnings and a valid waiver are prerequisites to the admissibility of statements made by an accused while in custody. The Court has chipped away at this protection as well. Statements obtained in violation of a defendant's *Miranda* rights are now admissible to impeach the defendant's direct examination testimony as to matters directly related to guilt or innocence. See *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971). The Court went even further in *United States v. Havens*, 446 U.S. 620, 100 S. Ct. 1912, 64 L. Ed. 2d 559 (1980), allowing the use of illegally obtained evidence to impeach statements made for the first time by the defendant on cross-examination. In dissent, Justice Brennan noted the severe impact of these decisions on the defendant's fifth amendment right to an unfettered decision as to whether to testify on his own behalf. *Havens, supra* (Brennan, J., dissenting).

The Court also long took the position that any conviction

based in whole or in part on an involuntary confession was invalid. See *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964). The Court specifically rejected as an "impermissible doctrine" the suggestion that admission of a coerced confession could be harmless error. See *Lynumn v. Illinois*, 372 U.S. 528, 537, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963). The Court based this unbending rule on the highly probative nature of confessions and on juror inability to comply with directions to ignore such evidence. See *Arizona v. Fulminante*, ____ U.S. ____, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (White, J., dissenting), citing *Cruz v. New York*, 481 U.S. 186, 107 S. Ct. 1714, 95 L. Ed. 2d 162 (1987) (White, J., dissenting); *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (White, J., dissenting). Nevertheless, the Court recently rejected *Lynumn* and held that harmless error analysis does apply to convictions based in part on admission of a coerced confession. See *Fulminante, supra*. See, also, *Colorado v. Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986) (confessions resulting from mental or emotional condition which prevents the exercise of free will but which confessions are not the result of coercion are admissible).

The Nebraska Constitution guarantees its citizens the rights to due process of law and against compulsory self-incrimination. See Neb. Const. art. I, §§ 3 and 12. It is time for this court to decide whether these provisions afford persons accused of crime greater protection from the use of coerced confessions than does the federal Constitution. In my view, we should interpret the Nebraska Constitution as continuing to require the exclusion of confessions obtained by any direct or implied promises, however slight. Contrary to the majority's assertions, under our prior cases using this standard, the trial court erred in admitting Haynie's confession in this case.

In *State v. Porter*, 235 Neb. 476, 455 N.W.2d 787 (1990), this court reversed the conviction of a defendant who confessed to the crimes charged only after a police officer told him that it could help him if he confessed and that it would look better for him if he did confess. The court held that the officer's statements constituted an implied promise of leniency rendering the confession involuntary as a matter of law and

therefore inadmissible.

Here, the officer who interrogated Haynie admitted telling Haynie that he would make a report indicating Haynie's cooperation and that the report would probably be taken into consideration in determining the number of cases filed against him. As in *Porter*, the officer's statements were an implied promise of leniency rendering Haynie's subsequent confession involuntary as a matter of law.

The majority attempts to distinguish *Porter* by noting that there the interrogator told the defendant he was sure the judge would take the defendant's cooperation into consideration. However, neither in that case nor in this case did the interrogator promise that the defendant's cooperation would definitely help him. In both cases the police held out the possibility that a judge or prosecuting attorney might respond favorably if informed of the defendant's cooperation as an inducement to making a statement. It is this implied promise of leniency which we held impermissible in *Porter*.

State v. Thomas, 232 Neb. 490, 441 N.W.2d 186 (1989), is similarly unavailing as support for the majority's decision. In that case the police interrogator did not promise to voluntarily report the defendant's cooperation, but only speculated as to the effect of such knowledge if the court became aware of it. The majority in the present case errs in focusing on the interrogator's musings as to the effect of his report on the prosecuting attorney. The improper inducement occurred, however, when the interrogator definitely promised to include in his report that Haynie talked freely, without any hesitation. The discretionary inclusion of such editorial comments, *combined with* speculation as to their effect on the court, certainly constitutes at least "slight" inducement to make a statement. Because the trial court erred as a matter of law in admitting Haynie's confession, this cause should be remanded for a new trial.

I also point out that in announcing its "totality-of-the-circumstances" test, the majority lists a number of "potentially material considerations" for the trial judge to address. Because we have never before indicated that such considerations are relevant when a confession is induced, the

the trial court in this case did not assess the voluntariness of Haynie's confession in light of these factors. Such an assessment involves factual determinations which this court is not competent to make on appeal. Therefore, in any event, this cause should be remanded to the trial court for a determination of the voluntariness of Haynie's confession under the court's new test.

STATE OF NEBRASKA, APPELLEE, V. REX A. MELTON, APPELLANT.

476 N.W.2d 842

Filed November 15, 1991. No. 90-579.

1. **Confessions: Appeal and Error.** The admission of a confession into evidence constitutes an independent determination by the trial court that the confession was voluntarily made; such determination will not be set aside on appeal unless the finding is clearly erroneous.
2. **Confessions.** Whether a statement, admission, or confession has been freely and voluntarily made depends upon the totality of the circumstances.
3. **Confessions: Prosecuting Attorneys: Proof: Self-Incrimination.** The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.
4. **Confessions: Evidence.** To be admissible in evidence, an accused's statement, confession, or admission must have been freely and voluntarily made and must not have been extracted by any direct or implied promise or inducement, no matter how slight.
5. **Confessions.** A confession is not voluntary if it is obtained by any direct or implied promises, however slight.
6. **Confessions: Police Officers and Sheriffs.** The test of voluntariness of a confession is whether an examination of all the circumstances discloses that the conduct of law enforcement officials was such as to overbear the defendant's will to resist and bring about confessions not freely self-determined.

Appeal from the District Court for Douglas County: J. PATRICK MULLEN, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Robert M. Spire, Attorney General, and Linda L. Willard for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Rex A. Melton appeals from a jury verdict of guilty of motor vehicle homicide and a maximum sentence imposed of 20 months' to 5 years' imprisonment.

On July 30, 1989, Melton and his friend, Mark Padgett, were involved in a one-car accident. The car swerved; careened off the Interstate; rolled twice, crushing the passenger side of the roof; and came to rest on its top. Witnesses who stopped were able to assist in pulling the defendant out of the vehicle; however, they were not able to free Padgett, who had been pinned between the roof and the dash of the car. The police and rescue squad arrived shortly thereafter, finding Padgett deceased due to massive head injuries and Melton loud and belligerent. After conducting a part of the investigation, two police investigators went to visit Melton at the hospital. Witnesses to the accident had not been able to identify which occupant had been driving the vehicle involved in the accident.

The officers described Melton's injuries as minor bumps and bruises and his behavior as combative. He used profanity, slurred his words, and had to be restrained. The officers found it too difficult to interview Melton in this condition, so one of the officers went back to the accident site to finish his onsite investigation and the other stayed at the hospital to complete reports.

At around 9:30 that evening, approximately 5 hours after the accident, officers went to the hospital to again attempt an interview with Melton. Without administering *Miranda* warnings, the officers spoke with Melton and obtained a tape-recorded statement from him regarding the accident. Melton essentially told the police that he and Padgett had consumed "a lot" of alcohol, that Padgett had been driving, and that Padgett had "lost it, hit something and wrecked." Melton also stated that he would not have been driving, as his license had been suspended for third-offense drunk driving. An

officer testified that in his mind, Melton was free to leave.

Upon further investigation, the police came to a general conclusion that due to the nature of the damage to the vehicle and the extent of the injuries to the respective occupants of the car, Padgett simply could not have been the driver of the vehicle.

At the request of the police department, the hospital notified it when Melton was ready to be released, and upon the hospital's doing so, police approached Melton in his hospital room and asked that he accompany them downtown to make a statement. Once in the accident investigation office of the police station, officers read Melton his *Miranda* rights and obtained his signature on the standard written *Miranda* form. Although Melton was not under formal arrest, the officers did consider Melton to be in custody. Melton did not request an attorney.

The officers noted to Melton the differences between the witnesses' testimony and Melton's. Officer Richard McWilliams, in particular, commented that Padgett would want Melton to be honest about the accident; that as a man, it would be the right thing to do to tell the truth; and that to place blame on a dead person merely as a means of escaping responsibility would be a cowardly thing to do.

The officers then showed Melton pictures of the wreckage from which he and Padgett had been pulled, at which point Melton said that he did not remember who had been driving. Then, according to Officer McWilliams, "basically voluntarily he says 'Well, Mark Padgett was driving' . . . 'We switched drivers, and I took control of the car, and the next thing I remember was hitting a ditch.' " The officers then taped Melton's statement.

The defendant assigns as error that (1) the district court erred in overruling his motion to suppress statements he had made to the police while in the hospital, because the statements were made involuntarily and Melton had not been apprised of his *Miranda* rights, and (2) the court erred in failing to suppress statements he made at the police station, because, in spite of his receiving *Miranda* warnings, the statements were not "freely and voluntarily given."

As to the defendant's first assignment of error, regarding the

statement made to officers at the hospital, we affirm. The admission of a confession into evidence constitutes an independent determination by the trial court that the confession was voluntarily made; such determination will not be set aside on appeal unless the finding is clearly erroneous. *State v. Hunt*, 212 Neb. 214, 322 N.W.2d 621 (1982). Whether a statement, admission, or confession has been freely and voluntarily made depends upon the totality of the circumstances. *State v. Bodtke*, 219 Neb. 504, 363 N.W.2d 917 (1985).

The U.S. Supreme Court, in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), held that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, the Court meant questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.

We have held that officers should give *Miranda* warnings prior to any questions asked at the hospital and failure to do so is a violation of the defendant's right against self-incrimination. Where a defendant was in custody at the time statements were elicited and the statements given by the defendant were responsive to direct questions asked by an officer, the admission of defendant's statements in a prosecution for theft of movable property was harmful error, since it could not be said beyond a reasonable doubt that admission of testimony as to the statements did not influence the verdict. See *State v. Thunder Hawk*, 212 Neb. 350, 322 N.W.2d 669 (1982).

The holdings in both *Miranda* and *Thunder Hawk* hinge, in application to this case, upon whether Melton was actually in custody when he was being questioned at the hospital by the police officers. In *Thunder Hawk*, the defendant was unquestionably in custody, as he had been formally arrested at the scene of an accident before being transported to the hospital for treatment.

This court defined custodial interrogation in *In re Interest of*

Durand, 206 Neb. 415, 293 N.W.2d 383 (1980). In that case, this court relied on *Rhode Island v. Innis*, 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980), and stated that " '[t]he *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. . . .' " *In re Interest of Durand, supra* at 420, 293 N.W.2d at 386. In *State v. Thunder Hawk, supra* at 355, 322 N.W.2d at 672, we found custodial interrogation in that

> [t]he officer testified that the statements given by the defendant were responses to express questions asked by the officer. At the time the incriminating statements were made, the investigation had reached the accusatory stage and had clearly focused on the defendant. The interrogation was aimed at soliciting incriminating statements from the defendant upon whom the investigation focused.

We find that Melton was not in custody. He was admitted to the hospital for treatment, was not under formal arrest, and was questioned by officers during the routine course of an accident investigation. Although it is not dispositive, Melton did not incriminate himself in his statement to the police at the hospital, in which statement he denied being the driver of the vehicle involved in the accident, the same position he maintained at trial.

We affirm the district court's decision to overrule Melton's motion to suppress his hospital statement. We find no evidence to suggest that the finding was clearly erroneous.

We also affirm the district court's admission into evidence of Melton's statement made to police while in custody.

To be admissible in evidence, an accused's statement, confession, or admission must have been freely and voluntarily made and must not have been extracted by any direct or implied promise or inducement, no matter how slight. *State v. Hankins*, 232 Neb. 608, 441 N.W.2d 854 (1989); *State v. Hayes*, 229 Neb. 53, 424 N.W.2d 624 (1988). Similarly, a confession is not voluntary if it is obtained by any direct or implied promises, however slight. *State v. Hall*, 237 Neb. 169, 465 N.W.2d 150 (1991); *State v. Mayhew*, 216 Neb. 761, 346 N.W.2d 236 (1984).

We have essentially outlined, by way of negative implication,

the level to which the pressure of the situation must rise before being deemed inherently coercive under the totality-of-the-circumstances test.

We held that the confession of a 21-year-old defendant, who neither maintained he was nor was shown to be mentally susceptible to pressure, which in any case was not shown to have existed, was voluntary despite the defendant's assertion that the passage of 2½ hours from the time of his oral confession until the taping of a statement was completed was in and of itself coercive. See *State v. Tucker*, 215 Neb. 636, 340 N.W.2d 376 (1983).

We have held that a simple suggestion by the interrogating officer that defendant would "feel better" if he would "tell us everything" did not improperly influence defendant's custodial statement and, thus, did not render the statement involuntary. *State v. Norfolk*, 221 Neb. 810, 381 N.W.2d 120 (1986). This court, in *State v. Haynie*, *ante* p. 478, 476 N.W.2d 905 (1991), reiterated the totality-of-the-circumstances test to be applied in evaluating the voluntariness of custodial confessions. See, also, *Tippitt v. Lockhart*, 859 F.2d 595 (8th Cir. 1988), *cert. denied* 490 U.S. 1100, 109 S. Ct. 2452, 104 L. Ed. 2d 1007 (1989); *United States v. Grant*, 622 F.2d 308 (8th Cir. 1980).

The *Tippitt* court, quoting *United States v. Ferrara*, 377 F.2d 16 (2d Cir. 1967), *cert. denied* 389 U.S. 908, 88 S. Ct. 225, 19 L. Ed. 2d 225, defined the test: "[T]he test of voluntariness is whether an examination of all the circumstances discloses that the conduct of 'law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined * * *.' . . ." 859 F.2d at 597.

Our decision in *State v. Haynie, supra*, affirmed the conviction of a defendant where, during the course of police interrogation, the interrogating officer assured the defendant that the officer would indicate on the arrest report that the defendant had talked freely, without hesitation, and that that would probably be taken into consideration on how many cases would be filed against him. The majority found, under the totality-of-the-circumstances test, that Haynie had made a

rational and voluntary decision to confess and that the officer's "rather innocuous statement that his report would indicate that the defendant talked freely, which *probably* would be taken into consideration on how many cases were filed against him, did not coerce or overbear the defendant's free will." *Id.* at 490, 476 N.W.2d at 913.

We adhere to our decision in *Haynie*, finding that under the totality of these circumstances the evidence supports the district court's finding that Melton's statement was voluntary and not unduly coerced.

We affirm the district court's ruling in its entirety.

AFFIRMED.

WHITE, J., dissenting.

I adhere to my position in my dissent in *State v. Haynie*, *ante* p. 478, 476 N.W.2d 905 (1991), and therefore dissent from the majority here as to the confession produced at the police station.

Admittedly, Melton testified at the suppression hearing that he was not forced or coerced to make a statement; however, his claim of inducement is not abandoned. Officer McWilliams utilized an extreme and outrageous inducement tactic that resulted in an inherently coercive situation in order to obtain a specific response from Melton.

Furthermore, Officer McWilliams' conduct greatly surpassed a simple suggestion that honesty would be the best policy by the implicit suggestion that by not admitting that he was the operator of the car, Melton was less than a man and was, in fact, a coward.

Melton had just survived a violent and hideous crash in which his close friend had died scarcely 24 hours earlier. Melton was read his *Miranda* rights, but, as in *Brewer v. Williams*, 430 U.S. 387, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977), *Miranda* readings alone do not always protect suspects from law enforcement officers. In *Brewer*, the police had deliberately played on the emotions of a kidnapping and murder suspect whom they knew to be deeply religious. Despite promises to the suspect's attorney to the contrary, the officers induced the suspect to make several incriminating statements and eventually to direct the police to the body, by noting the

treacherous weather conditions, the fact that the defendant was the only person who knew where the body was located, and the fact that the parents of the little girl were entitled to have a Christian burial for her. *Id.*

Here, as in *Brewer*, law enforcement officials preyed upon a defendant's situational vulnerability to obtain a confession. Melton had stuck to his original story with consistency for 30 to 35 minutes before breaking down and admitting that he indeed had been the driver. Officer McWilliams exploited, for no other purpose than to obtain a confession, a man who was distraught, agonizing, and grieving over the loss of his friend.

Under the circumstances, dwelling repeatedly on responses Padgett would have wanted the defendant to give and what responses would be manly or cowardly was in and of itself inherently coercive and inappropriate. Despite his receiving the *Miranda* warnings, Melton's statements at the police station were involuntary. It seems the police already knew, as the evidence so indicated, who must have been driving. The extent of the damage to the vehicle and the extent of injuries to Melton and Padgett, respectively, all indicated that Melton could not have been the passenger.

The ruling on the police station confession should have been reversed because, as a matter of law, the officer's questioning was inherently coercive.

STATE OF NEBRASKA, APPELLEE, V. JEFFRY E. MENUEY, APPELLANT.
476 N.W.2d 846

Filed November 15, 1991. No. 90-745.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, the Nebraska Supreme Court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence, such matters being for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.
2. **Trial: Juries.** Once a case has been submitted to the jury, the jury shall have no communication with nonjurors.

3. _____: _____. Once discharged, an alternate juror becomes a stranger to the jury and is not to be present or otherwise participate in the jury's deliberations.
4. _____: _____. Although the presence of a discharged alternate juror in the jury room constitutes an unwarranted intrusion upon the jury and is to be guarded against, such an intrusion which can be said to have been harmless beyond a reasonable doubt does not require a new trial.
5. **Rules of Evidence: Jurors: Testimony.** Neb. Rev. Stat. § 27-606(2) (Reissue 1989) permits a juror to testify regarding whether any outside influence was improperly brought to bear upon any juror.
6. **Sentences: Appeal and Error.** Sentences imposed within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion.

Appeal from the District Court for Box Butte County: ROBERT R. MORAN, Judge. Affirmed.

Dean S. Forney, Box Butte County Public Defender, for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

I. INTRODUCTION

Pursuant to verdicts, the defendant-appellant, Jeffry E. Menuey, was adjudged guilty on each of two counts of criminal nonsupport of his children, in violation of Neb. Rev. Stat. § 28-706 (Reissue 1985). He was thereafter sentenced on the first count to imprisonment for a period of 1 year and on the second count to probation for a period of 5 years. He assigns as error the district court's (1) failure to find the evidence insufficient to support the verdicts, (2) failure to find that the presence during the jury's deliberations of a discharged alternate juror "violates the verdict," and (3) imposition of an excessive sentence. We affirm.

II. FACTS

Defendant and Marilynn Menuey were married on June 6, 1969, and divorced on December 2, 1983, after producing two sons: Lance Aaron, 19 years of age at the time of the subject trial, which was held May 29 and 30, 1990, and Jay Ryan, 15 years of age. Prior to the divorce and up until his resignation on

July 20, 1987, defendant was employed as a conductor by Burlington Northern Railroad, worked out of Alliance, Nebraska, and earned approximately $38,000 a year.

The divorce decree gave the parties joint custody of the boys and required defendant to pay the sum of $300 per month for the support of his two sons. A modification order entered September 4, 1986, gave full custody to the former wife and provided that defendant was to pay $380 in child support ($190 for each boy) during the months of October through December 1986, and beginning in January 1987, $570 per month. This order further required him to notify the district court of any changes in his address, telephone number, Social Security number, and employer.

Defendant has made no support payments since August 1, 1987, except for $1,125.88 paid on February 13, 1990, from the proceeds of a sheriff's sale of his automobile. As of the time of trial, defendant owed $18,083.65 in delinquent child support. Neither did the defendant keep the court advised of his whereabouts or of the changes in his employment status.

During the 3 intervening years between the entry of the divorce decree and the modification order, defendant was active in his sons' lives. He coached their sports teams and maintained a strong relationship with them. Defendant testified, however, that following the modification order and his former wife's successful bid to gain full custody of the boys, his relationship with the boys deteriorated.

Defendant's principal defense for his failure to pay child support and to notify the court of his whereabouts and employment status rests on his assertion that following the modification order, he became so upset about no longer being able to see his sons on a regular basis and his former wife's attempts to garnish his wages that he became mentally and emotionally incapable of functioning, to the point that his work suffered. He also claims that his decision to terminate his employment and leave Alliance was not an attempt to avoid child support but, rather, to solve his emotional problems.

Several witnesses testified regarding defendant's depressed state after his loss of joint custody. A fellow employee stated that defendant's relationship with his boys went "downhill"

and that he was "[d]epressed, distraught, he just wasn't himself." This coworker's wife testified that "[m]ental-wise [defendant] just couldn't function. He was very, very disturbed." Another fellow employee and friend of the defendant claimed that defendant was "very emotionally distraught, [he] is normally a very outgoing person." Defendant's mother said he was "[d]own in the dumps, depressed, unhappy, just everything, he didn't know what to do." According to defendant's father, defendant told him he "was going crazy . . . he didn't know whether to shot [sic] himself."

On May 28, 1987, defendant went on a 30-day leave of absence from his Burlington Northern employment. During this leave, he and his present wife, whom he married on September 17, 1985, traveled to Canada, Washington, Oregon, Mexico, and Arizona. Near the end of his leave, defendant decided he could not go back to Alliance because of "the pressures that had built upon us," explaining that

> [a]ll the people that I had known all my life had been alienated against me, I felt nobody understood what I was trying to tell them, the concerns with my kids, everything else, I just felt if I came back I'd be in the same position I was in when I left.

While on leave from Burlington Northern, defendant searched for and found other work. In June 1987, he interviewed with a prospective employer in Seattle, Washington, and then traveled to its headquarters at Tucson, Arizona. He was offered a job, but found it would not be available until September 30, 1987. Consequently, he rejected that offer and instead took a job with another employer around July 20 or 25, 1987. He began at $4.25 an hour and eventually earned $6 an hour for a 40-hour week. He worked with that employer until it closed on December 22 or 23.

In January 1988, defendant and his present wife traveled to Corpus Christi, Texas, where he was offered a position with a Boston, Massachusetts, employer. The couple began traveling to Boston, but stopped in Alabama to visit his present wife's oldest daughter. While there, defendant contacted the Boston company and was told his job had been eliminated.

Defendant then secured his most recent job on February 4, 1988, as a laborer for an Alabama employer. Defendant was paid $4.20 an hour for a 40-hour week and remained so employed until January 5, 1990, when he resigned, a week after he was arrested. Thus, during the approximately 2 1/2 years that defendant was gone from Alliance, he was employed for all but the months of June and July 1987 and January 1988.

The former wife contends that defendant's motive for leaving Alliance and cutting off contact with people in the community was to avoid paying the modified child support. According to her, defendant "said that if anyone tried to make him pay more than $300, he would just leave and [she] would never be able to get a dime and [she] would never be able to do nothing about it." The older boy testified that his father said "if my mother kept harassing him, he would just pack up and leave and we would never hear from him again." The defendant denied these accusations. However, in a letter to his supervisor at Burlington Northern, he wrote: "I feel that I can no longer work for a company that allows an ex-spouse to garnishe [sic] my paycheck at will for any whim she choses [sic]. . . . I am better off working for a non-corporation." On two occasions prior to defendant's leaving Burlington Northern, the former wife sought to garnish his wages. She was successful the first time; the second time she was not.

During the defendant's and his present wife's travels, defendant made no child support payments, claiming he did not make enough money. According to his testimony, he earned approximately $21,000 in 1987, approximately $12,000 in 1988, and $16,400 in 1989. The former wife has been the sole financial provider for the two boys since July 1987. The older son testified that the last time he saw defendant was on December 25, 1986, and the last time he talked to him was on January 12, 1987. Since that time, the boys have received neither money nor mail from defendant. Nonetheless, defendant claims he never tried to conceal his whereabouts from the former wife. He admitted, however, that he knew at all times how much he owed in child support and that he knew he was required by law to pay as ordered, but he made no attempt to modify or reduce his support obligation.

When the case was submitted to the jury shortly before noon, the district court discharged the alternate juror. Absurdly enough, the bailiff nonetheless invited the alternate to have lunch with the jurors. In preparing to embark for lunch, several of the jurors and the alternate returned to the jury room to leave some items and retrieve others. According to the alternate, no discussion of the case took place at this time. Both the bailiff and the alternate testified that the case was not discussed either during lunch or on the return trip to the courthouse. Upon returning to the jury room after lunch, the alternate inquired of the bailiff whether he could remain with the jury during its deliberations. The bailiff thereupon proceeded to the district court judge's office to inquire; upon his return, approximately 5 to 10 minutes later, he told the alternate that he could not remain. The alternate then departed. The alternate also testified that while he was in the jury room after lunch, he sat behind the jurors, and although he heard their discussions, he did not participate in them.

Ten of the jurors testified that there was no talk about the case over lunch, the alternate did not participate during the approximately 10 minutes that he was in the jury room while they chose a foreman, and their decisions were not in any way influenced by the alternate's presence. Some of these jurors testified that the alternate did not participate while they deliberated, while several other jurors of this group stated that the case was not discussed during the time the alternate was in the jury room, as they spent the time choosing a foreman. The parties stipulated that the two remaining jurors, if called, would testify that the alternate neither participated in the case nor influenced them in their decisions. After the alternate departed, the jurors deliberated for approximately 45 minutes before agreeing upon their verdicts.

III. ANALYSIS

With that background, we turn our attention to defendant's assignments of error.

1. Sufficiency of Evidence

Defendant attempts to support his first assignment of error, which claims the verdicts are not supported by the evidence, by

the simple, and faulty, expedient of focusing on certain evidence and ignoring the rest. He relies only on testimony which suggests that he left Alliance and his longtime employment with Burlington Northern because he became depressed over his deteriorating relationship with his children. He concludes that it therefore cannot be said he willfully refused to comply with the modification order.

Even if the testimony on which defendant centers his attention supports his conclusion, a matter we do not decide, defendant's contention fails to take into account the evidence which indicates that he left his employment and the area, and neglected to keep the court advised of his whereabouts, because he had become aware by the garnishments that he could otherwise be made to comply with the modification order, a circumstance that he determined he would not permit to happen.

The resolution of this assignment of error is therefore controlled by the oft-cited rule that in determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence, such matters being for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. *State v. Winchester*, *post* p. 535, 476 N.W.2d 862 (1991); *State v. Byam*, *ante* p. 186, 474 N.W.2d 688 (1991). There is more than sufficient evidence to support a finding that defendant is and has always been able-bodied and capable of earning at a rate sufficient to enable him to support his children as directed in the modification order and that he simply elected, for reasons of his own, not to do so. See *Knippelmier v. Knippelmier*, 238 Neb. 428, 470 N.W.2d 798 (1991). Thus, the evidence supports the verdicts, and the first assignment of error fails.

2. Presence of Discharged Alternate

The assertion presented in defendant's second assignment of error, that the presence of the alternate during the jury's deliberations "violates the verdict," is more correctly expressed

as a claim that the situation deprived defendant of his due process right to a fair and impartial trial. See *Simants v. State*, 202 Neb. 828, 277 N.W.2d 217 (1979).

(a) Right to Bias- and Prejudice-free Jury

U.S. Const. amend. VI provides that in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." Neb. Const. art. I, § 6, guarantees the right of trial by a 12-person jury in the district court. Neb. Const. art. I, § 11, further guarantees one accused of a crime "a speedy public trial by an impartial jury . . . ." Consequently, an accused is "guaranteed a fair trial by an impartial jury." *Kirchman v. State*, 122 Neb. 30, 32, 239 N.W. 207, 208 (1931). See *Fugate v. State*, 169 Neb. 420, 99 N.W.2d 868 (1959).

To help ensure that an accused receives a fair and impartial trial, the Legislature has provided statutory guidelines regarding jury procedure and conduct. Neb. Rev. Stat. § 29-2004 (Reissue 1989) provides that "alternate jurors shall also be kept with the other jurors and, except as hereinafter provided, shall be discharged upon the final submission of the cause to the jury." Neb. Rev. Stat. § 29-2022 (Reissue 1989) provides, in effect, that once the case has been submitted, the jury shall have no communication with nonjurors.

(b) Status of Discharged Alternate

The first question which comes to mind is: What is the status of a discharged alternate juror? The Massachusetts Supreme Court, in *Commonwealth v. Smith*, 403 Mass. 489, 494, 531 N.E.2d 556, 559 (1988), answered: " '[A]lternate jurors,' as long as they remain alternates, really are not jurors. When they attend jury deliberations they do so as mere strangers."

The Ohio Court of Appeals, in relying on *Potter v. Perini*, 545 F.2d 1048 (6th Cir. 1976), declared that since "an alternate juror is not part of the deliberating body, he should not be permitted to be with the group, as he may have an influence on their determination." *State v. Blair*, 34 Ohio App. 3d 6, 8, 516 N.E.2d 240, 242 (1986). See, also, *State v. Scrivner*, 676 S.W.2d 12 (Mo. App. 1984) (finding presence of alternate juror was error but harmless); *State v. Coulter*, 98 N.M. 768, 652 P.2d

1219 (N.M. App. 1982) (finding presence of alternate juror creates presumption of prejudice); *Luster v. State*, 515 So. 2d 1177, 1180 (Miss. 1987) ("alternate jurors are to be discharged in accord with the statute and are not to be present or participate in deliberations under any circumstances not prescribed by statute").

The significance of a right to an impartial 12-person jury has also been addressed by other jurisdictions. The U.S. Supreme Court has announced that an accused has a right to have a jury deliberate its verdict in secrecy. *Clark v. United States*, 289 U.S. 1, 53 S. Ct. 465, 77 L. Ed. 993 (1933). The U.S. Court of Appeals for the 10th Circuit, in holding that an accused's right to an impartial jury had been violated, wrote:

> Once these proceedings [have] commenced, "the jury" consisted only of the prescribed number of jurors. The alternate then became as any other stranger to the proceedings regardless of whether she had been discharged....
>
> ....
>
> Once the prescribed number of jurors becomes "the jury," then, and immediately, any other persons are strangers to its proceedings. Their presence destroys the sanctity of the jury....

United States v. Beasley, 464 F.2d 468, 469-70 (10th Cir. 1972). The Supreme Court of Colorado, whose Constitution, like ours, requires a jury of 12, has stated that " 'twelve is the magic number,' " and no rule provides for more than 12 jurors. *People v. Boulies*, 690 P.2d 1253, 1256 (Colo. 1984).

(c) Effect of Unauthorized Presence

There can thus be no question that the bailiff's inexplicable misconduct violated defendant's federal and state constitutional rights to a fair and impartial trial. The controlling question becomes whether that violation compels reversal of his convictions.

In *Simants v. State*, 202 Neb. 828, 277 N.W.2d 217 (1979), the sheriff, who also testified as a material witness, fraternized with the jurors during sequestration. The trial court found the communications unwarranted, but ruled they did not rise to a

level prejudicing the accused. In reversing, this court observed that "when an improper communication with a juror or jurors is shown to have taken place in a criminal case, a rebuttable presumption of prejudice arises and the burden is on the State to prove that the communication was not prejudicial," *id.* at 835, 277 N.W.2d at 221, saying:

> The foundational basis for the rule of presumptive prejudice is that a fair trial in a fair tribunal is a basic requirement of constitutional due process. The reasons for the rule have been variously expressed by the courts. " 'The verdict of a jury * * * should represent the concurring judgment, reason and intelligence of the entire jury, free from outside influence from any source whatever.' " *Bramlett v. State*, 129 Neb. 180, 261 N.W. 166 [(1935)].

Simants, supra at 836-37, 277 N.W.2d at 222. The *Simants* court also declared that the occurrence of unauthorized private communications was forbidden and would invalidate the verdict unless it was shown to be harmless error. In other words, *Simants* concluded that not all errors, even if of constitutional magnitude, entitle an accused to the reversal of an adverse trial result; it is only a prejudicial error, that is, an error which cannot be said to have been harmless beyond a reasonable doubt, which requires that a conviction be set aside. *State v. Hartmann*, *ante* p. 300, 476 N.W.2d 209 (1991); *State v. Green*, 238 Neb. 492, 471 N.W.2d 413 (1991); *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990); *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). See, also, *State v. McDonald*, 230 Neb. 85, 430 N.W.2d 282 (1988).

State v. LeBron, 217 Neb. 452, 349 N.W.2d 918 (1984), applied the same doctrine in determining that LeBron had not been prejudiced by the fact that two jurors had overheard the judge and his law clerk discussing the case. See, also, *Sunderland v. United States*, 19 F.2d 202 (8th Cir. 1927) (juror conversing with witness).

In *Gandy v. State*, 24 Neb. 716, 40 N.W. 302 (1888), the court officer having charge of the jury sat in on a portion of the jury's deliberations. The *Gandy* court, in following *People v. Knapp*,

42 Mich. 267, 3 N.W. 927 (1879), adopted the rule that the officer's mere presence in the jury room deprived the jury of the opportunity for private and confidential discussion and was thus grounds for automatic reversal. In so holding, this court wrote in *Gandy, supra* at 727, 40 N.W. at 306:

> It is the policy of the law that the verdict of every jury shall be reached by free and deliberate consultation, without bias or prejudice, and be based upon the evidence. The evidence is to be carefully weighed, the instructions to the court considered, and a conclusion reached which shall satisfy each member of the jury. This can only be had by preventing an intrusion for any considerable time by the bailiff, or others, while the jury are considering their verdict.

The same view was reiterated in *Cooney v. State*, 61 Neb. 342, 85 N.W. 281 (1901), wherein the sheriff and officer having charge of the jury remained with the jury during several hours of deliberations. The *Cooney* court found that while neither party participated nor advised the jury in any manner, their presence had deprived Cooney of a substantial right. However, the *Cooney* court noted that "the presence of" a court officer "or other intruder in the jury room for a short time while the jury are deliberating, will [not] in every case vitiate the verdict rendered . . . ." *Id.* at 344, 85 N.W. at 282. The *Cooney* court thus recognized that not every intrusion into the jury room automatically results in prejudice to an accused. It is only those intrusions which result in prejudice to an accused, that is, intrusions into the jury room by third parties of a nature which cannot be said to have been harmless beyond a reasonable doubt, which require that a conviction be set aside.

The presence in the jury room of a discharged alternate juror is qualitatively different from the presence of a court officer or of a law enforcement officer, as occurred in *Gandy* and *Cooney*. A court officer might be expected to be present to monitor the jury's discussions for some purpose of the court; the presence of a law enforcement officer could be expected to inhibit criticism of the State's case. The presence of both a court officer and a law enforcement officer increases the inhibitory effect. However, a discharged alternate juror represents neither

the State nor the court. Thus, although the presence of such an alternate in the jury room constitutes an unwarranted intrusion upon the jury and is to be guarded against, not every such intrusion requires a new trial. The uncontradicted evidence in this case, if properly received, establishes that the alternate's presence did not prejudice defendant. We thus move on to a consideration of that question.

(d) Receipt of Evidence of Outside Influence

Neb. Rev. Stat. § 27-606(2) (Reissue 1989) provides that a juror may not be questioned about any "matter or statement occurring during the course of the jury's deliberations," but may testify regarding whether any "outside influence was improperly brought to bear upon any juror." In *State v. Roberts*, 227 Neb. 489, 493, 418 N.W.2d 246, 249 (1988), we held that § 27-606(2) "controls inquiries into the validity of a verdict reached by a jury." The trial judge in *State v. LeBron*, 217 Neb. 452, 349 N.W.2d 918 (1984), upon discovering the overheard conversation described in part III(2)(c) above, examined the jurors to determine whether they were nonetheless capable of rendering a fair and impartial verdict and, in refusing to declare a mistrial, concluded that there was no prejudice to LeBron. We affirmed. The Missouri courts have also found convincing affidavits by jurors establishing that they were not influenced by a discharged alternate juror's presence. *State v. Scrivner*, 676 S.W.2d 12 (Mo. App. 1984).

We thus conclude that the evidence concerning the effect of the discharged juror's unauthorized presence was properly received. Consequently, there is no more merit to defendant's second assignment of error than there is to his first.

3. SENTENCES

Neither is there any merit to his third and final assignment of error, which claims the prison sentence is excessive.

Violations of § 28-706 are Class IV felonies, punishable by imprisonment for up to 5 years, a $10,000 fine, or both such imprisonment and fine. See Neb. Rev. Stat. § 28-105 (Reissue 1985). We say again that sentences imposed within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion. *State v. Winchester, post* p. 535,

476 N.W.2d 862 (1991); *State v. Witt*, *ante* p. 400, 476 N.W.2d 556 (1991); *State v. Hartmann*, *ante* p. 300, 476 N.W.2d 209 (1991).

As we have also noted before, the failure to support one's children is a grave and ignoble offense and is to be treated as such. *State v. Reuter*, 216 Neb. 325, 343 N.W.2d 907 (1984). The district court did not abuse its discretion.

IV. DECISION

Since the record sustains none of defendant's assignments of error, the judgment of the district court is affirmed.

AFFIRMED.

MELVIN LEE MINER, APPELLANT, V. ROBERTSON HOME FURNISHING AND CORNHUSKER CASUALTY, APPELLEES, STATE OF NEBRASKA, VOCATIONAL REHABILITATION FUND, INTERVENOR-APPELLEE.

476 N.W.2d 854

Filed November 15, 1991. No. 91-064.

1. **Workers' Compensation.** Agreements to settle workers' compensation cases not filed in and approved by the Workers' Compensation Court are void and of no effect.
2. _____. A finding that an employee's injury is compensable under the Workers' Compensation Act is required for approval of any vocational rehabilitation plan paid for by the vocational rehabilitation trust fund.
3. _____. When the parties to a workers' compensation suit agree to a settlement including a program of vocational rehabilitation paid for by the employer or its insurer, a finding that the injury is covered by the act is not necessarily required.
4. **Workers' Compensation: Legislature: Intent.** The Legislature intended the Workers' Compensation Court, in approving settlement agreements, to focus on protecting the economic interests of the employee, rather than assessing the validity of the underlying claim.
5. **Workers' Compensation: Appeal and Error.** Findings of fact by the Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong.
6. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support findings of fact made by the Workers' Compensation Court after rehearing, the evidence is considered in the light most favorable to the successful party.

7. **Workers' Compensation: Proof.** In a workers' compensation case involving a preexisting condition, the claimant must prove by a preponderance of evidence that the claimed injury or disability was caused by the claimant's employment and is not merely the progression of a condition present before the employment-related incident alleged as the cause of the disability.
8. **Workers' Compensation.** A workers' compensation claimant is entitled to recover when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that in the absence of the preexisting condition no disability would have resulted.
9. **Workers' Compensation: Expert Witnesses.** Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability.
10. _____: _____. An expert's opinion is not sufficient to support a claim unless the opinion is based on a reasonable degree of medical certainty or a reasonable probability.
11. **Appeal and Error.** Regarding a question of law, the Supreme Court has an obligation to reach its conclusion independent of the conclusion reached by the court whose judgment is subject to review.
12. **Workers' Compensation: Expert Witnesses: Proof.** Expert testimony giving rise to conflicting inferences of equal probability as to the cause of an injury is insufficient, but if the inferences are not equally consistent and the more probable conclusion supports the employee's claim, the claimant sustains his burden of proof on that issue.
13. **Workers' Compensation: Expert Witnesses: Proof: Words and Phrases.** Medical testimony expressed in terms of "possibility" is insufficient, while such testimony couched in terms of "probability" is sufficient.
14. **Workers' Compensation: Expert Witnesses.** "Magic words" to the effect that an expert's opinion is based on a reasonable degree of medical certainty or probability are not necessary.
15. _____: _____. The sufficiency of an expert's opinion is judged in the context of the expert's entire statement.

Appeal from the Nebraska Workers' Compensation Court. Affirmed in part, and in part reversed and remanded.

O. William VonSeggern, of Grimminger & VonSeggern, for appellant.

Scott A. Burcham and David A. Dudley, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellees.

Don Stenberg, Attorney General, and Lisa D. Martin-Price for intervenor-appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

This workers' compensation case is before us for the second time. The first decision is reported at *Miner v. Robertson Home Furnishing*, 236 Neb. 514, 462 N.W.2d 96 (1990). This court takes judicial notice of the record in that case. See *State ex rel. Pederson v. Howell*, 239 Neb. 51, 474 N.W.2d 22 (1991).

BACKGROUND

The record shows that the plaintiff-appellant, Melvin Lee Miner, has a history of back problems. On October 10, 1986, while in the employ of the defendant-appellee Robertson Home Furnishing (Robertson), Miner reinjured his back while moving a refrigerator. Robertson and its insurer, defendant-appellee Cornhusker Casualty, voluntarily paid Miner's medical bills and disability from the date of injury until the initial hearing in this case.

After the October 10 accident, the parties also agreed to a vocational rehabilitation plan whereby Miner would be trained as a pilot so that he could become a crop duster. This plan was denied, however, by the vocational rehabilitation specialist of the Workers' Compensation Court. See Neb. Rev. Stat. § 48-162.01 (Reissue 1988). Based on this rejection, Miner filed suit in the Workers' Compensation Court on July 15, 1988. In their answer, the appellees for the first time denied that Miner's condition arose out of and in the course of his employment with Robertson.

After a hearing held on November 16, 1988, the Workers' Compensation Court found that Miner's injuries were caused by the October 10 accident and thus were compensable, but rejected the rehabilitation plan agreed to by the parties. The court gave Miner 90 days to submit a new plan for approval.

Following this disposition two significant events occurred. First, the appellees petitioned for a rehearing, contesting the court's findings that Miner's injuries arose out of and during the course of his employment with Robertson and that he was entitled to vocational rehabilitation. Second, an alternative rehabilitation plan signed by both Robertson's insurer and the Workers' Compensation Court rehabilitation specialist, dated February 10, 1989, was received in the Workers' Compensation

Court on March 6.

On rehearing, the Workers' Compensation Court dismissed Miner's petition, finding that he failed to produce sufficient expert evidence linking his injuries to the accident of October 10. We remanded for a clarification regarding whether certain evidence was admitted during the rehearing and whether the second rehabilitation plan constituted a settlement of the case. In response, the Workers' Compensation Court filed an "Amplification of Dismissal," from which Miner appeals.

ASSIGNMENTS OF ERROR

On appeal, Miner argues that the Workers' Compensation Court erred in (1) finding that the second rehabilitation plan did not constitute a binding settlement of the case and (2) finding that he failed to produce expert testimony sufficiently definite and certain to establish a causal connection between his injuries and the October 10 accident.

THE REHABILITATION PLAN

In its amplified order, the Workers' Compensation Court states that the second rehabilitation plan was received into evidence and considered by the rehearing panel. The court then offers three grounds for its decision that the plan does not constitute a binding settlement agreement. First, the court asserts that "an employee who suffers disability as a result of an injury not covered by the Nebraska Workers' Compensation Act is not entitled under any circumstances to vocational rehabilitation services under the Act." Second, the court finds that the plan does not constitute an agreement to settle the case. Finally, the court holds that even if the plan does manifest an agreement to settle the case, it is not binding because the court never approved it.

Neb. Rev. Stat. § 48-136 (Reissue 1988) requires that a copy of any settlement agreement reached by the parties be filed with the Workers' Compensation Court and that the agreement otherwise comply with the act. Neb. Rev. Stat. § 48-140 (Reissue 1988) provides that no settlement is final unless approved by and "a finding [is made] by" the Workers' Compensation Court and the district court or any appellate court. This court has construed these two sections as rendering

void and of no effect settlement agreements not filed in and approved by the Workers' Compensation Court. See, *Duffy Brothers Constr. Co. v. Pistone Builders, Inc.*, 207 Neb. 360, 299 N.W.2d 170 (1980); *James v. Rainchief Constr. Co.*, 197 Neb. 818, 251 N.W.2d 367 (1977); *Miller v. Schlereth*, 151 Neb. 33, 36 N.W.2d 497 (1949); *Riggins v. Lincoln Tent & Awning Co.*, 143 Neb. 893, 11 N.W.2d 810 (1943); *Zurich General Accident & Liability Ins. Co. v. Walker*, 128 Neb. 327, 258 N.W. 550 (1935).

In its amplified order, the Workers' Compensation Court suggests that a finding that the injury is covered by the act is necessary to approve a settlement involving vocational rehabilitation. Though it is not necessary to specifically decide this issue today, we question the validity of this conclusion.

Section 48-162.01 gives the Workers' Compensation Court authority to include a program of vocational rehabilitation in a covered employee's compensation award. The costs of such a program are paid for out of a state vocational rehabilitation trust fund. See § 48-162.01(3) and Neb. Rev. Stat. § 48-162.02 (Reissue 1988). To facilitate the efficient and effective provision of rehabilitation programs, the Legislature also authorized the Workers' Compensation Court to hire vocational rehabilitation specialists to maintain a directory of approved rehabilitation facilities and to aid the court in determining appropriate rehabilitation plans for injured employees. See § 48-162.01.

There is no question a finding that an employee's injury is compensable under the act is required for approval of a vocational rehabilitation plan *paid for by the trust fund.* However, if the parties agree to a settlement including a program of vocational rehabilitation *paid for by the employer or its insurer*, we doubt a finding that the injury is covered by the act is necessarily required. One of the principal reasons parties settle lawsuits is to avoid the costs and risks involved in trying cases where the outcome is uncertain. Requiring proof of the compensability of an injury as a prerequisite to settlement would eliminate the incentive to settle workers' compensation cases and render the provisions of the act allowing such settlements a nullity. See § 48-136 (giving the parties the right to settle all matters of compensation between themselves).

In making these observations, we emphasize that compliance with the provisions of §§ 48-136 and 48-140, including approval by the Workers' Compensation Court, is required for any settlement agreement. We merely express the view that the Legislature intended such review to focus on the sufficiency of the agreement in terms of protecting the economic interests of the employee, rather than on the validity of the underlying claim. See *Bailey v. United States Fidelity & Guaranty Co.*, 99 Neb. 109, 155 N.W. 237 (1915) (in approving lump-sum settlements, court acts as guardian or next friend of the claimants to preserve the rights of a class of persons often inexperienced in business matters).

However, as noted earlier, we do not today address the significance of the rehearing panel's failure to approve the second rehabilitation plan. It is unnecessary to do so because of our agreement with the Workers' Compensation Court that the parties did not intend to settle this case by signing that plan.

Findings of fact by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong. *Cline v. County Seat Lounge, ante* p. 42, 473 N.W.2d 404 (1991). In testing the sufficiency of the evidence to support findings of fact made by that court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Id.* Therefore, in determining whether the Workers' Compensation Court erred in finding that the parties did not intend to settle the case, despite their signing the second rehabilitation plan, we consider the evidence in the light most favorable to Robertson and Cornhusker Casualty.

The second rehabilitation plan is dated February 10, 1989. However, the pretrial order filed in this case on March 30, indicates that the parties stated that they had not reached a settlement. Moreover, the fact that the parties went to trial on June 1 on the issues of the cause of Miner's injuries and his entitlement to vocational rehabilitation is rather conclusive evidence that the parties did not intend to settle the case on February 10. Though the purpose of the second plan is unclear, it was apparently intended as a conditional resolution in the event of a result adverse to the appellees on rehearing.

Whatever the explanation, we cannot say the Workers' Compensation Court clearly erred in finding that the parties did not agree to settle the case by signing the second rehabilitation plan. Miner's first assignment of error is without merit.

THE EXPERT TESTIMONY

In a workers' compensation case involving a preexisting condition, the claimant must prove by a preponderance of evidence that the claimed injury or disability was caused by the claimant's employment and is not merely the progression of a condition present before the employment-related incident alleged as the cause of the disability. *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990); *Fees v. Rivett Lumber Co.*, 228 Neb. 617, 423 N.W.2d 483 (1988). However, a workers' compensation claimant may recover when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that in the absence of the preexisting condition no disability would have resulted. *Heiliger, supra*, citing *Spangler v. State*, 233 Neb. 790, 448 N.W.2d 145 (1989).

Unless its nature and effect are plainly apparent, an injury is a subjective condition requiring an expert opinion to establish a causal relationship between the incident and the injury or disability. *Fees, supra*, quoting *Mendoza v. Omaha Meat Processors*, 225 Neb. 771, 408 N.W.2d 280 (1987). An expert's opinion is not sufficient as a matter of law to support such a showing unless it is based on a reasonable degree of medical certainty or a reasonable probability. *Fuglsang v. Blue Cross*, 235 Neb. 552, 456 N.W.2d 281 (1990). As is the case for any question of law, on appeal this court has an obligation to reach a conclusion independent of the conclusion reached by the court whose judgment is subject to review. *In re Estate of McFayden*, 235 Neb. 214, 454 N.W.2d 676 (1990).

Here, Miner claims that the October 10 accident caused him to suffer a herniated disk requiring a lumbar spinal fusion. The appellees produced evidence suggesting that Miner's condition resulted from injuries sustained prior to his employment with Robertson. The Workers' Compensation Court classified this

dispute as one requiring expert medical evidence to establish the cause of Miner's disability. We agree. See *Binkerd v. Central Transportation Co.*, 236 Neb. 350, 461 N.W.2d 87 (1990).

To support his claim that the October 10 accident caused his disability, Miner offered an entry from the office notes of his treating physician, Dr. Gordon D. Bainbridge, dated May 23, 1989, and stating in relevant part:

> [I]ncidentally, [Miner] tells me that the insurance company told him that the second accident when he was lifting a refrigerator was not the cause, but was related to the first accident and as I have told Melvin there is a 10% recurrence after you have had a previous disc problem and certainly the timing of the lifting of the refrigerator and the pain that he developed afterwards, suggests that indeed the injury that he had when he lifted the refrigerator is what caused his recurrent disc problem.

In its amplified order dismissing Miner's petition, the Workers' Compensation Court stated that this entry was admitted into evidence but was insufficient as a matter of law to support Miner's claim because the opinion is not expressed with a reasonable degree of medical certainty or probability. We disagree.

In *Welke v. City of Ainsworth*, 179 Neb. 496, 138 N.W.2d 808 (1965), this court enunciated the standard for determining whether an expert's opinion is sufficient to support a workers' compensation claim. The court held that when a physician's testimony

> gives rise to conflicting inferences of *equal* degree of probability so that the choice between them is a mere matter of conjecture, a compensation award cannot be sustained. Where, however, the inferences are not equally consistent and the more probable conclusion is that for which the claimant contends, then the claimant sustains his burden of proof on the element involved.

(Emphasis supplied.) *Id.* at 504-05, 138 N.W.2d at 813.

Based on *Welke*, this court has held that medical testimony expressed in terms of "possibility" is not sufficient, though such testimony couched in terms of "probability" is sufficient. See, *Hohnstein v. W.C. Frank*, 237 Neb. 974, 468 N.W.2d 597

(1991); *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 308 N.W.2d 503 (1981). See, also, *Husted v. Peter Kiewit & Sons Constr. Co.*, 210 Neb. 109, 313 N.W.2d 248 (1981) (White, J., dissenting). This court has also held that "magic words" indicating an expert's opinion is based on a reasonable degree of medical certainty or probability are not necessary, *Hohnstein, supra*, and that the sufficiency of the opinion is judged in the context of the expert's entire statement, see *Welke, supra*.

Here, the appellees focus on the single phrase in Dr. Bainbridge's notes to the effect that the circumstances "suggest" the October 10 incident caused Miner's disability. The appellees cite *Caradori v. Frontier Airlines*, 213 Neb. 513, 329 N.W.2d 865 (1983), for the proposition that Dr. Bainbridge's conclusion that the circumstances "suggest" a compensable injury is no more definite than the physician's opinion in that case that the disability "could" have been caused by the injuries in question. Because we held the expert testimony insufficient in *Caradori*, the appellees argue we must do so in this case as well.

The appellees' argument ignores the larger context of Dr. Bainbridge's report, however. In that report, Dr. Bainbridge first notes the insurance company's conclusion that the October 10 accident did not cause Miner's injuries. He then offers two specific reasons for disagreeing with that conclusion. First, he points out that there is only a 10-percent chance of recurrence after a previous disk problem. Second, he notes the close proximity between the onset of Miner's symptoms and the accident. Reading Dr. Bainbridge's entire report in context, it is clear he is asserting that the insurance company's conclusion is incorrect. Based on the statistical foundation for that conclusion, as bolstered by the timing of the symptoms, Dr. Bainbridge's notes do not give rise to conflicting inferences rendering the choice between them a matter of conjecture. Instead, though he did not use "magic words" to so state, Dr. Bainbridge's notes indicate a conclusion to a reasonable degree of medical certainty that the October 10 incident caused the injuries for which Miner is seeking compensation. See, *Hare v. Watts Trucking Service*, 220 Neb. 403, 370 N.W.2d 143 (1985)

(testimony that work-related accident "very likely" exacerbated claimant's preexisting condition held sufficient); *Halbert v. Champion International*, 215 Neb. 200, 337 N.W.2d 764 (1983) (testimony that it was "very probable" that the injury related to the accident held legally sufficient).

We note that our holding does not mean Miner has satisfied his burden of proof in this case. We hold only that Dr. Bainbridge's office notes are not insufficient as a matter of law to support Miner's claim. The appellees produced expert testimony contradicting Dr. Bainbridge's conclusion. On remand, the Workers' Compensation Court must decide as a question of fact whether the injuries for which Miner seeks compensation were caused by an accident arising out of and in the course of his employment with Robertson Home Furnishing. See *Scott v. State*, 218 Neb. 195, 352 N.W.2d 890 (1984).

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

BOSLAUGH, J., participating on briefs.

CAPORALE, J., dissenting.

The admission of Dr. Bainbridge's office note has added nothing of significance to the evidence of causation in this case; I thus adhere to my dissent in *Miner v. Robertson Home Furnishing*, 236 Neb. 514, 462 N.W.2d 96 (1990).

To say that the sequence and timing of an occurrence "suggests" a causal relationship between that occurrence and an injury is simply another way of saying that there is a possible connection between the two. As a matter of law that is, as the compensation court correctly held, insufficiently definite and certain to establish that the event in question proximately caused the disability for which benefits are sought. See *Gilbert v. Sioux City Foundry*, 228 Neb. 379, 422 N.W.2d 367 (1988).

Nor do I understand the majority's compulsion to give advice as to whose interests the compensation court is to protect in settlements. The majority itself recognizes that the question is not involved in the resolution of the case. The difficulty with obiter dictum of this type is that it is made without full consideration of the point and is thus likely to be misleading, if

not wrong. Can there be any real quarrel with the proposition stated by the compensation court that "an employee who suffers disability as a result of an injury not covered by the Nebraska Workers' Compensation Act is not entitled under any circumstances to vocational rehabilitation services under the Act?" In order for the compensation court to assert jurisdiction, must there not be at least a colorable claim that one seeking benefits under the act is subject to its provisions?

BOSLAUGH, J., joins in this dissent.

STATE OF NEBRASKA, APPELLEE, v. JOEL D. WINCHESTER, APPELLANT.
476 N.W.2d 862

Filed November 15, 1991. No. 91-173.

1. **Convictions: Appeal and Error.** A conviction in the bench trial of a criminal case must be sustained on appeal if the evidence, viewed and construed in the light most favorable to the State, is legally sufficient to support that conviction.
2. **Trial: Judgments.** When a case is tried to the court without a jury, the finding of the court has the same effect as a jury verdict.
3. **Convictions: Appeal and Error.** When reviewing a conviction in a criminal case, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence.
4. **Sentences: Appeal and Error.** This court will not disturb a sentence on appeal if the sentence is within the statutory limits and the sentencing court did not abuse its discretion.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Cheryl M. Kessell for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

This case is an appeal from the district court for Douglas County. The defendant, Joel D. Winchester, was convicted by the trial court, sitting without a jury, of first degree sexual assault, use of a knife in the commission of a felony, and first degree false imprisonment. After a hearing, the court determined that defendant was not a mentally disordered sex offender. Defendant was sentenced to 8 to 15 years' imprisonment for the sexual assault; 2 to 5 years for the use of a knife to commit a felony, to be served consecutively to the sentence for sexual assault; and 5 years for the false imprisonment, to be served concurrently "with any other sentences." Credit was given on the sentences for time served. The defendant timely appealed, alleging that the trial court erred in determining the evidence was sufficient to support the convictions and in imposing excessive sentences. We affirm.

A conviction in the bench trial of a criminal case must be sustained on appeal if the evidence, viewed and construed in the light most favorable to the State, is legally sufficient to support that conviction. *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991). So viewed, the record shows the following: In the early morning hours of June 7, 1990, the victim willingly accompanied defendant, whom she had just met, to find a girl friend of the victim's. Defendant took the victim to an Omaha bookstore where defendant worked. After the victim entered the store, defendant's friendly attitude toward her changed. Defendant walked up behind the victim, grabbed her hair, and put a knife to her throat. Although the victim was struggling and pleading, the defendant forced her to the back of the building, stating, "Do what you're told, or you're going to get killed, you bitch." The defendant either ripped or cut the victim's clothing and told her to take her dress off, which she did.

After much struggling, the defendant threw the victim to the floor and sat on her back. He continued to threaten the victim with the knife, "swinging it around and scraping [the victim] with it on [her] arms and scraping [her] with the knife as he was trying to hold [her] down 'cause [she] was trying to get away." Defendant then pulled the victim's arms behind her back and

bound them with duct tape.

In her testimony the victim then described a "thrust" into her vagina. She thought the object thrust into her was either the handle of the knife or the defendant's fingers. She testified it was not defendant's penis. After this, defendant began to pick up books that had been knocked from the shelves during the struggle, while making strange statements such as "Mommy's going to be mad." The victim was able to get away from him and to escape through the front door.

By chance, two police cruisers were parked across the street from the small shopping mall in which the bookstore was located. A police officer testified that at about 3:30 a.m. the naked victim came running toward the cruisers, with her hands taped behind her back. She was hysterical and was screaming, "He's trying to kill me. He's got a knife." The victim had cuts and scrapes on her arms, legs, and neck.

The victim pointed out the defendant to the police officers. One of the officers tried to apprehend the defendant, but defendant ran into the bookstore and locked the door. The officer broke out the glass door, entered the store, and captured defendant at the back of the store. After the officer captured defendant, he removed a knife from defendant's person. The victim testified that it was the knife used in the assault.

The victim did not tell officers at the scene that she had been sexually assaulted. She told them that the defendant had not removed his clothes during the assault. The victim was taken to the hospital and examined by a doctor, but no one did a vaginal examination, and the victim said nothing to any medical personnel about the penetration. The victim said she did not tell anyone about it because she did not realize that the penetration, which was obviously not penile penetration, constituted a sexual assault in the first degree.

The victim first mentioned the penetration approximately 3 weeks later, when she told her husband about it. She testified that her husband encouraged her to tell someone about the penetration and that she told the prosecutor involved with the case the next time she was in contact with him. That next contact was about a week before the trial.

The defendant was originally charged with attempted first

degree sexual assault. A week prior to trial, after the victim informed the State prosecutor that there had been vaginal penetration, the State moved for leave of court to amend the information to charge first degree sexual assault. A preliminary hearing was held on the charges, and at its conclusion, the district court allowed the amendment and ordered defendant held for trial.

A criminal conviction will not be reversed if the evidence, viewed most favorably to the State, is legally sufficient to support the conviction. *State v. Tuttle*, 238 Neb. 827, 472 N.W.2d 712 (1991); *State v. Johnson*, 236 Neb. 831, 464 N.W.2d 167 (1991). When a case is tried to the court without a jury, the finding of the court has the same effect as a jury verdict. *State v. Clark*, 236 Neb. 475, 461 N.W.2d 576 (1990).

This court may set aside a verdict in a criminal case as unsupported only "when the evidence is so lacking in probative force that the court can say as a matter of law that the evidence is insufficient to support a finding of guilt beyond a reasonable doubt." *State v. Frazier*, 234 Neb. 107, 109, 449 N.W.2d 230, 231 (1989). Accord *State v. Hai Dang*, 220 Neb. 120, 368 N.W.2d 486 (1985).

In the case before us, if the trial court determined that the victim was credible, her version of the facts fully supports a guilty verdict. When reviewing a conviction in a criminal case, the Supreme Court does not resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. Those matters are left to the fact finder at the trial. *State v. Johnson, supra.* The trial judge in the case before us chose to believe the testimony of the victim, and that testimony is more than sufficient evidence to support the guilty verdict.

The victim's explanation for her failure to immediately notify the officers and medical personnel of the sexual penetration is credible. It is not common knowledge among laypersons that anything other than penile penetration may constitute penetration sufficient to result in a sexual assault in the first degree. Neb. Rev. Stat. § 28-319(1) (Reissue 1989) provides in substance that anyone who subjects another to sexual penetration by threats, force, or deception is guilty of

first degree sexual assault. Sexual penetration includes within its definition penetration by "any object manipulated by the actor into the genital or anal openings of the victim's body." Neb. Rev. Stat. § 28-318(6) (Reissue 1989). The facts in this case, as testified to by the victim, support a determination that there was an intrusion into the body of the victim. We hold that there was sufficient evidence in this case to support the convictions and that defendant's first assignment of error is without merit.

Defendant next contends that the trial court erred in imposing excessive sentences. First degree sexual assault is a Class II felony, Neb. Rev. Stat. § 28-319(2) (Reissue 1989), subject to a sentence of 1 to 50 years' imprisonment. Use of a knife to commit a felony is a Class III felony, Neb. Rev. Stat. § 28-1205(2) (Reissue 1989), subject to a sentence of 1 to 20 years' imprisonment, a $25,000 fine, or both. First degree false imprisonment is a Class IV felony, Neb. Rev. Stat. § 28-314(2) (Reissue 1989), subject to a maximum of 5 years' imprisonment, a $10,000 fine, or both.

Section 28-1205(3) provides that the use of a knife in the commission of a felony "shall be treated as a separate and distinct offense from the felony being committed, and sentences imposed under the provisions of this section shall be consecutive to any other sentence imposed." The Nebraska Supreme Court has held that this language is mandatory and the trial court has no discretion to order that the sentence be served concurrently. *State v. Trevino*, 230 Neb. 494, 432 N.W.2d 503 (1988).

The sentences imposed on defendant are obviously within the statutory limits for each crime. This court will not disturb a sentence on appeal if the sentence is within the statutory limits and the sentencing court did not abuse its discretion. *State v. Tuttle, supra*; *State v. Johnson, supra*. Some of the factors a court should consider when imposing a sentence are the seriousness of the offense and the motivation for the offense, as well as a defendant's past criminal record and the amount of violence involved in the commission of the crime. *State v. Thomas*, 229 Neb. 635, 428 N.W.2d 221 (1988).

The defendant in this case has an extensive criminal record,

including convictions for burglary and sexually related crimes. The facts of this case, as set out above, show that great violence was involved in these crimes. The trial court did not abuse its discretion in imposing the sentences herein. Defendant's assignments of error are without merit.

AFFIRMED.

DENNIS HARTFORD, APPELLANT, V. WOMENS SERVICES, P.C., APPELLEE.

477 N.W.2d 161

Filed November 22, 1991. No. 89-690.

1. **Injunction: Equity.** An action for injunction sounds in equity.
2. **Equity: Appeal and Error.** In an appeal of an equity action, this court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
3. **Municipal Corporations: Public Officers and Employees: Nuisances.** Neb. Rev. Stat. § 14-102(12) (Reissue 1987) vests in public officials of cities of the metropolitan class the power to provide for keeping sidewalks clean and free from obstructions and accumulations.
4. _____: _____: _____. Neb. Rev. Stat. § 14-103 (Reissue 1987) gives the city council of a metropolitan class city the power to define, regulate, suppress, and prevent nuisances.
5. **Actions: Injunction: Nuisances: Standing: Proof.** In order for a private individual to maintain an action to enjoin a public nuisance, that individual must show that he suffers some peculiar or special injury not common to the general public. A private individual may not maintain an action to prevent or suppress a public nuisance unless that individual will sustain or has sustained some special injury therefrom distinct and different in kind from that which the individual will or does suffer in common with the rest of the public.
6. **Equity: Nuisances: Standing.** It is a general rule that a public nuisance does not furnish grounds for an action in equity by an individual who merely suffers an injury which is common to the public. The mere fact that a plaintiff uses a street more frequently than others of the public and may suffer more from the alleged nuisance than others does not present a distinct injury. Such plaintiff's injury is the same in character as that which the public will suffer. The only difference is one of degree, and not of kind.

7. **Constitutional Law: Injunction.** When the facts justify it, injunctive relief may be granted to protect the right of an individual to exercise that individual's first amendment right of free speech.
8. **Injunction.** An injunction is not wholly a writ of right.
9. _____. Injunction is an extraordinary remedy and ordinarily will not be granted except in a clear case where there is an actual and substantial injury; the right must be clear and the damage irreparable.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Peter C. Bataillon, of Sodoro, Daly & Sodoro, and Kelly K. Duncan, of Rutherford Institute of Nebraska, for appellant.

Lawrence I. Batt and Thomas P. Kenny, of Batt & Brodkey, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Dennis Hartford appeals the trial court's refusal to enjoin the watering of an Omaha medical clinic's lawn while Hartford demonstrates against abortion outside the clinic. We affirm the ruling of the district court for Douglas County.

The appellant argues that the Womens Services, P.C., medical clinic is sprinkling the public sidewalks by turning on its automatic sprinkler system every morning, thereby creating a nuisance which interferes with his right to free speech.

Appellee is an obstetric and gynecologic clinic which is housed in a building owned by the sole shareholder of the clinic. Abortions are among the medical services it offers. The clinic is located at the corner of Douglas and 46th Streets in Omaha. The clinic is bounded by Douglas Street on the north and 46th Street on the west. The building is set back from both streets. Private parking lots are located on both the north and the south sides of the building. There is lawn to the west of the structure. Public sidewalks are along the north and west perimeters of the lot, edging the northern parking lot and the lawn. There are strips of lawn between the sidewalks and the curbing.

The entrance to the clinic's building is on the west side, with a private walkway giving access across the lawn from the 46th

Street sidewalk. There is also access from the parking lots to the porch, immediately in front of the entrance. Patients may use either the private walkways to the entrance from the parking lots or the public sidewalk which parallels 46th Street. Picketers are restricted to the public sidewalk area.

An automatic sprinkler system waters the lawn between approximately 7:15 and 8:30 every morning between April and October. Four separate cycles operate at intervals, each watering a separate portion of the lawn. The clinic director testified that depending on the time of year, each cycle was set to operate for 10 to 15 minutes. Hartford testified that each of three cycles operate separately for 20 minutes and that the fourth cycle "doesn't always work." Only one cycle operates at a time. At no time are all sections of the lawn watered simultaneously.

When each unit of the system is in use, the sidewalk bordering that section of the lawn being watered gets wet. Of course, anyone and anything on the sidewalk bordering the section being sprinkled at the time will also get wet. At oral argument, Hartford conceded that only about 10 percent of the sidewalk on the 46th Street side of the building gets wet at any one time.

Hartford regularly prays and demonstrates against abortion outside the clinic once a week. He pickets the clinic's abortion practices, hands out literature, and gives advice regarding abortion alternatives to any woman about to enter the clinic who is willing to listen to him. He speaks loudly in order to be heard by the women entering the clinic. As stated, Hartford usually goes to the clinic once a week, between 7:15 and 8:30 a.m. He believes that this is the time when women visit the clinic for abortion procedures. Hartford considers that to be the time when he has the best chance of being the most effective in his attempt to dissuade women from having abortions.

The appellant testified that the spray from the water sprinklers, which at times is 5 feet high, inhibits him from standing on the public sidewalk in front of the clinic. He testified that he and his literature get wet and that he is forced into the street to stay dry, thereby endangering his safety and making it more difficult than normal to speak to the women

who are entering the clinic.

Hartford asked Womens Services, P.C., to water its lawn at a different time or to water it in such a way that the sidewalks remain clear and dry. The clinic refused. The appellant complained to the Omaha city prosecutor's office and asked that charges be brought against the clinic for violation of Omaha Mun. Code, ch. 18, art. I, § 18-4 (1975) (creation or maintenance of a nuisance) and Omaha Mun. Code, ch. 20, art. III, § 20-44 (1967) (obstructing public ways). That office refused to prosecute. Thereafter, Hartford filed an amended petition in the district court for Douglas County praying for an injunction prohibiting the clinic from watering its lawn when the appellant was using the sidewalk for the purposes already enumerated. Hartford contended that the clinic's watering practices constitute a nuisance and restrict his freedom of speech and assembly and his right to demonstrate.

The district court denied Hartford's request for injunctive relief. It found that the appellant lacked standing as a private individual to maintain an action for nuisance, since the injury he suffered was not different and distinct from that suffered by the general public.

Hartford appeals the trial court's denial of injunctive relief, arguing that the district court erred (1) in determining that the harm suffered by the appellant was identical to that suffered by all persons who used the public sidewalk and (2) in not finding that the appellee's actions were in violation of Neb. Rev. Stat. §§ 20-123 and 20-124 (Reissue 1987), which Hartford claims protect him from interference with his right to free speech.

On appeal, Hartford still seeks only injunctive relief. An action for injunction sounds in equity. In an appeal of an equity action, this court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. Spire v. Strawberries, Inc., ante* p. 1, 473 N.W.2d 428 (1991).

Neb. Rev. Stat. § 14-102(12) (Reissue 1987) vests in public

officials of cities of the metropolitan class the power to provide for keeping sidewalks clean and free from obstructions and accumulations. Omaha is a city of the metropolitan class. Neb. Rev. Stat. § 14-103 (Reissue 1987) gives the city council of a metropolitan class city the power to define, regulate, suppress, and prevent nuisances. Neb. Rev. Stat. § 18-1720 (Reissue 1987) gives all cities and villages in Nebraska the power and authority by ordinance to define, regulate, suppress, and prevent nuisances; to declare what shall constitute a nuisance; and to abate and remove the nuisance.

Omaha Mun. Code, ch. 18, art. I, § 18-2, in relevant part, has defined a nuisance as being

> any person doing an unlawful act, or omitting to perform a duty, or suffering or permitting any condition or thing to be or exist, which act, omission, condition or thing either:
>
> (a) Injures or endangers the comfort, repose, health or safety of others; or
>
> . . . .
>
> (d) Unlawfully interferes with, obstructs or tends to obstruct or renders dangerous for passage any public or private street, highway, sidewalk, stream, ditch or drainage . . . .

In order for a private individual to maintain an action to enjoin a public nuisance, that individual must show that he suffers some peculiar or special injury not common to the general public. A private individual may not maintain an action to prevent or suppress a public nuisance unless that individual will sustain or has sustained some special injury therefrom distinct and different in kind from that which the individual will or does suffer in common with the rest of the public. *Schroder v. City of Lincoln*, 155 Neb. 599, 52 N.W.2d 808 (1952). That case involved the obstruction of a public sidewalk in the city of Lincoln by a bank that had gained permission from the city to set up a curb teller machine on the sidewalk east of the bank. Schroder, as an individual citizen, sued on his own behalf, claiming he had an interest in keeping the sidewalks free from public nuisances. He alleged no special interest, right, or injury differentiating him from the general public. The court found that it was the duty of the city to maintain the action to keep the

sidewalks clear and that Schroder had no authority to bring the action.

Hartford claims to have an interest which brings him to that portion of the public sidewalk bordering the women's clinic more often and with an interest greater than that of the general public. Hartford concludes, therefore, that when that sidewalk is obstructed, he suffers a special injury distinct and different in kind from the general public. *Schroder v. City of Lincoln, supra* at 606, 52 N.W.2d at 812, specifically holds:

> "It is a general rule that a public nuisance does not furnish grounds for an action in equity by an individual who merely suffers an injury which is common to the public. . . . [T]he mere fact that [a] plaintiff uses that street more frequently than others of the public and may suffer more from the alleged nuisance than others does not present a distinct injury. [Such plaintiff's] injury is the same in character as that which the public will suffer. The only difference is one of degree, and not of kind."

Under the above analysis, Hartford's injury, if any, is no different from that experienced by any other person using the sidewalks bordering the women's clinic. Consequently, he does not have a private right of action in nuisance against the clinic. Hartford's first assignment of error is without merit.

Hartford also argues that he is entitled to an injunction under §§ 20-123 and 20-124. Section 20-123 provides:

> It is the intent, purpose, and public policy to protect, preserve, and perpetuate the constitutional right to freely speak, write, and publish on all lawful subjects, including the right to make a comprehensive distribution of such printed materials, either commercial or noncommercial, by using the most effective lawful means or methods, and being responsible for any damages.

As far as relevant here, § 20-124 provides:

> Any individual, corporation, or municipality that attempts to interfere with or restrain the exercise of the freedoms referred to in [§] 20-123 . . . either by ordinance or otherwise, shall be guilty of a misdemeanor and upon conviction thereof shall be fined in an amount not exceeding one hundred dollars, or be imprisoned for a

> period not exceeding six months, or be both so fined and imprisoned, and shall stand committed until such fine and costs of prosecution are paid. Each day such violation is committed or permitted to continue shall constitute a separate offense and shall be punishable as such hereunder.

When the facts justify it, injunctive relief may be granted to protect the right of an individual to exercise that individual's first amendment right of free speech. See *ACORN v. City of Frontenac*, 714 F.2d 813 (1983). See, also, *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (1975). However, the facts in this case do not justify granting Hartford that type of relief. An injunction is not wholly a writ of right. *Richardson v. Kildow*, 116 Neb. 648, 218 N.W. 429 (1928). Injunction is an extraordinary remedy and ordinarily will not be granted except in a clear case where there is an actual and substantial injury; the right must be clear and the damage irreparable. *City of Lincoln v. Cather & Sons Constr., Inc.*, 206 Neb. 10, 290 N.W.2d 798 (1980).

In this case, Hartford has not proved an actual and substantial injury. If anything, he has proved only the minor inconvenience of relocating his speaking "platform" a short distance from time to time. The conduct of the women's clinic in watering its lawn has not shut down Hartford's access to the women visiting the clinic. He is not made to leave the area. By his admission in open court, Hartford has conceded that at any given time approximately 90 percent of the sidewalk on the 46th Street side of the clinic is available for him to pray and to speak and demonstrate against abortion. The record reflects that virtually all of the sidewalk bordering the clinic on the Douglas Street side of the clinic is available to Hartford for these purposes. He is not prevented from speaking to any woman who shows an interest in listening to him. Hartford is not guaranteed an audience under the federal or state Constitutions, only a reasonable opportunity to speak. The actions of the clinic do not deprive him of that opportunity. Hartford has not proved substantial injury, and he is not entitled to an injunction prohibiting the clinic from watering its lawn in the manner that it has in the past.

In conclusion, Hartford has no standing to assert damages under a public nuisance theory, and he has not proved a substantial injury. The refusal of the trial court to issue an injunction in this case must be affirmed.

AFFIRMED.

MICHAEL D. MATHESON, APPELLANT, V. DEL STORK ET AL., APPELLEES.

477 N.W.2d 156

Filed November 22, 1991. No. 89-784.

1. **Demurrer: Pleadings.** In ruling on a demurrer, a petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled.
2. _____: _____. In considering a demurrer, a court must assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial.
3. _____: _____. A demurrer tests the substantive legal rights of the parties, based on facts and reasonable inferences therefrom, not conclusions.
4. **Pleadings.** A petition will be found sufficient if, from the statement of facts set forth therein, the law entitles a plaintiff to recover.
5. _____. Facts are sufficient to constitute a cause of action when they are a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff.
6. **Torts: Intent: Proof.** The necessary elements of tortious interference with a business relationship or expectation are (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted.
7. **Torts: Case Disapproved.** Any suggestion in *Miller Chemical Co., Inc. v. Tams*, 211 Neb. 837, 320 N.W.2d 759 (1982), that an intentional but justified interference may subject the interfering party to liability is disapproved.
8. **Libel and Slander.** Spoken or written words are slanderous or libelous per se only if they falsely impute the commission of a crime involving moral turpitude, an infectious disease, or unfitness to perform the duties of an office or employment, or if they prejudice one in his or her profession or trade or tend to disinherit one.

9. _____. In determining whether a communication is libelous or slanderous per se, a court must construe the questioned language in its ordinary and popular sense.
10. **Libel and Slander: Proof: Damages.** Where a communication is ambiguous or meaningless unless explained, or prima facie innocent, but capable of defamatory meaning, it is necessary to specially allege and prove the defamatory meaning of the words used, and to allege and prove special damages.
11. **Libel and Slander.** The circumstances under which the publication of an allegedly defamatory communication was made, the character of the audience and its relationship to the subject of the publication, and the effect the publication may reasonably have had upon such audience must be taken into consideration.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

Thom K. Cope and Patricia A. Knapp, of Bailey, Polsky, Cope & Wood, for appellant.

Paul M. Schudel, of Woods & Aitken, for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Plaintiff-appellant, Michael D. Matheson, asserts in his third amended petition that defendants-appellees, Del Stork and Doug Gilg, tortiously interfered with the business relationship or expectancy he had enjoyed with his former employer, The Goodyear Tire and Rubber Company (initially also named as a defendant and brought to this court as an appellee but later dismissed pursuant to the stipulation of all the then parties), and that Stork and Gilg defamed him as well. The district court concluded the aforesaid operative petition failed to state a cause of action, sustained the demurrer filed by Stork and Gilg, and, upon Matheson's election to stand on the operative petition, dismissed the suit. Matheson claims the district court erred in determining that he had stated neither (1) a tortious interference action nor (2) a defamation action. We affirm.

As to the claim that Stork and Gilg interfered with his business relationship or expectancy with Goodyear, Matheson alleges, in summary:

1. His employment by Goodyear constituted a business relationship between Goodyear and himself, and this relationship was known to his fellow employees Stork and Gilg.

2. As Matheson's direct supervisor, Gilg had evaluated Matheson on a regular basis. However, in the summer of 1987, contrary to the established chain of command, Stork, who supervised both Gilg and Matheson, began evaluating the latter.

3. In the past, Matheson's performance had always been rated as surpassing Goodyear's normal requirements. However, in the summer of 1987, Stork and Gilg evaluated Matheson's performance as poor. This was done intentionally, in bad faith, and with malice arising out of the personal ill will generated by Matheson's challenge of Stork's and Gilg's authority and the resulting "business related confrontations."

4. As a direct consequence of his evaluation, Stork, on August 7, 1987, directed to named individuals a memorandum headed "GOODYEAR-LINCOLN," which further reads:

> DEVELOPMENT PERSONNEL
>
> Effective immediately M D Matheson is transferred to Hose Design responsible for all Ford specs, order handling, POI program coordination, and CADAM-CATIA coordination. H X Nguyen will be responsible for Ford branched hose design, and Asia-Pacific hose. A H Renard will be responsible for Ford coolant hose, except branched Ford fuel system hose and ARP hose.
>
> M D Matheson is replaced in Process Engineering by C E Block.

5. Goodyear's hose design group "was not consonant" with Matheson's professional qualifications in that it required less technical expertise than his prior position in the process engineering group, nor was the hose design group position as personally and professionally advantageous to Matheson as was the process engineering position for which he had been hired. The transfer placed Matheson in a position for which he had not been hired and was a "demotion and a detriment to his career."

6. In effecting the transfer, Stork and Gilg, acting outside the scope of their duties, for their own personal gain and for no

business purpose of Goodyear, "personally, purposefully, unjustifiably, and intentionally" interfered with Matheson's relationship with Goodyear.

7. As a result of the transfer, which Stork and Gilg knew was not consonant with his qualifications, Matheson was "constructive[ly] discharge[d]," forced to involuntarily terminate his business relationship with Goodyear, and made to seek other employment.

8. Stork and Gilg acted as above described not for any business purpose of Goodyear, but for their personal gain and to eliminate Matheson from Goodyear's employment, as the consequence of all of which Matheson suffered damages.

As to the claim that Stork and Gilg defamed him, Matheson reiterates all of the foregoing allegations and adds:

1. In intentionally and unjustifiably effecting Matheson's transfer, Stork and Gilg intentionally made a constructive statement to the effect that Matheson was not capable, proficient, qualified, or fit to perform the duties of his employment.

2. Said constructive statement defamed him, as it "became known to other engineers" in his field and put his competence as a developmental engineer, both generally and with respect to his performance at Goodyear, into question in the engineering community.

3. Stork and Gilg knew or should have known that their constructive statement would have become known to other engineers.

We begin our analysis by recalling that in ruling on a demurrer, the petition is to be liberally construed; if as so construed the petition states a cause of action, the demurrer is to be overruled. *Braesch v. Union Ins. Co.*, 237 Neb. 44, 464 N.W.2d 769 (1991). In considering a demurrer, a court must

> "assume that the pleaded facts, as distinguished from legal conclusions, are true as alleged and must give the pleading the benefit of any reasonable inference from the facts alleged, but cannot assume the existence of a fact not alleged, make factual findings to aid the pleading, or consider evidence which might be adduced at trial."

Hecker v. Ravenna Bank, 237 Neb. 810, 812, 468 N.W.2d 88, 92

(1991). Stated more simply, a demurrer tests the substantive legal rights of the parties, based on facts and reasonable inferences therefrom, not conclusions. *St. Paul Fire & Marine Ins. Co. v. Touche Ross & Co.*, 234 Neb. 789, 452 N.W.2d 746 (1990). A petition will be found sufficient if, from the statement of facts set forth in the petition, the law entitles a plaintiff to recover. *Ruwe v. Farmers Mut. United Ins. Co.*, 238 Neb. 67, 469 N.W.2d 129 (1991). Facts are sufficient to constitute a cause of action when they are a narrative of the events, acts, and things done or omitted which show a legal liability of the defendant to the plaintiff. *Gruenemeier v. Seven-Up Co.*, 229 Neb. 267, 426 N.W.2d 510 (1988).

Matheson's first assignment of error avers the district court erred in determining that he failed to well plead facts sufficient to state a tortious interference with his Goodyear business relationship or expectancy.

The necessary elements of tortious interference with a business relationship or expectation are (1) the existence of a valid business relationship or expectancy, (2) knowledge by the interferer of the relationship or expectancy, (3) an unjustified intentional act of interference on the part of the interferer, (4) proof that the interference caused the harm sustained, and (5) damage to the party whose relationship or expectancy was disrupted. *Community Title v. Roosevelt Federal S&L*, 796 S.W.2d 369 (Mo. 1990); *Gordon v. Noel*, 356 N.W.2d 559 (Iowa 1984); *Stofer v. First Nat. Bank of Effingham*, 212 Ill. App. 3d 530, 571 N.E.2d 157 (1991); *Dolenga v. Aetna*, 185 Mich. App. 620, 463 N.W.2d 179 (1990); *Quail Ridge Assocs. v. Chemical Bank*, 162 A.D.2d 917, 558 N.Y.S.2d 655 (1990). See, also, *Miller Chemical Co., Inc. v. Tams*, 211 Neb. 837, 320 N.W.2d 759 (1982); *DeLay First Nat. Bank & Trust Co. v. Jacobson Appliance Co.*, 196 Neb. 398, 243 N.W.2d 745 (1976). However, any suggestion in *Miller Chemical Co., Inc. v. Tams, supra*, that an intentional but justified interference may subject the interfering party to liability is disapproved.

The gravamen of the tortious interference aspect of Matheson's suit is that Stork and Gilg, acting outside the scope of their employment authority, for purposes of their own and with bad motives, intentionally interfered with Matheson's

employment relationship with Goodyear by causing him to be transferred from one division to another, thus forcing him to resign.

Since Matheson did not allege the existence of a contract obligating Goodyear to employ him for a particular period of time, it must be inferred that he was an at-will employee. Assuming, but not deciding, that there can ever be a tortious interference with such an employment relationship, and assuming further, but again not deciding, that another employee acting outside his or her employment authority may under any circumstances tortiously interfere with such a relationship, Matheson's pleading nonetheless fails to state a cause of action under this theory of recovery.

Matheson has pled no facts which support his conclusion that the fourth or fifth elements of tortious interference, harm and damages, exist. Even if the transfer from one division to the other was brought about by tortious interference, Matheson's charge fails to allege facts from which it can reasonably be inferred that the transfer was in fact retrogressive and thus the demotion he claims it was. While he asserts that the transfer was "not consonant" with his professional qualifications and that it was not as "personally and professionally advantageous," these claims alone state nothing more than Matheson's personal dissatisfaction with the transfer.

The operative petition is void of facts showing a distinction between the process engineering group and the hose design group. Matheson has pled nothing about the duties of each position, rates of pay, supervisory duties, working conditions, opportunities for advancement, or comparative duties. No matter how liberally a petition is construed, a court may not supply facts which are not pled. As Matheson has failed to plead facts from which it can be inferred that he was harmed, there can be no damages. See *Prather v. Eisenmann*, 200 Neb. 1, 11, 261 N.W.2d 766, 772 (1978) ("[t]he measure of recovery in all civil cases is compensation for the injury sustained"). There is thus no merit to Matheson's first assignment of error.

The essence of Matheson's second assignment of error, which asserts the district court erred in determining that he failed to well plead facts sufficient to state a defamation action, is that

he was defamed by the memorandum described earlier.

Spoken or written words are slanderous or libelous per se only if they falsely impute the commission of a crime involving moral turpitude, an infectious disease, or unfitness to perform the duties of an office or employment, or if they prejudice one in his or her profession or trade or tend to disinherit one. See *Nelson v. Rosenberg*, 135 Neb. 34, 280 N.W. 229 (1938). In determining whether a communication is libelous or slanderous per se, the court must construe the questioned language "in its ordinary and popular sense." *Hennis v. O'Connor*, 223 Neb. 112, 116, 388 N.W.2d 470, 474 (1986). Moreover, where a communication is "ambiguous or . . . meaningless unless explained, or . . . *prima facie* innocent, but capable of defamatory meaning, it is necessary to specially allege and prove the defamatory meaning of the words used, and to allege and prove special damages." *Hudson v. Schmid*, 132 Neb. 583, 587, 272 N.W. 406, 409 (1937). Further, the circumstances under which the publication of an allegedly defamatory communication was made, the character of the audience and its relationship to the subject of the publication, and the effect the publication may reasonably have had upon such audience must be taken into consideration. *Miller v. American Sports Co.*, 237 Neb. 676, 467 N.W.2d 653 (1991).

Matheson asserts no single express statement, written or spoken, by Stork or Gilg which defames him. Rather, Matheson bases his attempt to state a cause of action under the defamation theory of recovery on a claimed "constructive statement" implicitly made through the distribution of the memorandum, which he asserts was "to the effect" that he "was not capable, proficient, qualified or fit to perform the duties of his employment," thus raising a question of his competence as an engineer and thereby defaming him generally and before the "engineering professional community." Yet, the contents of the memorandum belie Matheson's conclusory allegations. The memorandum does nothing more than announce that certain duties are assigned to Matheson, that he is transferred from one division to another, and that certain others shall be responsible for designated activities. It does not criticize Matheson in any way. The memorandum is at best,

from Matheson's point of view, "ambiguous or . . . meaningless unless explained." *Hudson, supra* at 587, 272 N.W. at 409.

Matheson's failure to allege facts which give the words used in the memorandum a defamatory meaning is fatal to the stating of a cause of action. There is thus no merit to Matheson's second assignment of error.

The record failing to sustain either of Matheson's assigned errors, the district court's judgment of dismissal is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JOSEPH EDGAR WHITE, APPELLANT.

477 N.W.2d 24

Filed November 22, 1991. No. 90-241.

1. **Homicide: Intent.** Under Neb. Rev. Stat. § 28-303 (Reissue 1989), one may commit first degree murder either by committing premeditated murder or by killing another person while in the commission of certain felonies.
2. **Homicide: Convictions.** A defendant need not be charged and convicted of an underlying felony in order to be convicted of first degree murder pursuant to Neb. Rev. Stat. § 28-303(2) (Reissue 1989).
3. **Homicide: Limitations of Actions.** The 3-year statute of limitations generally applicable to felonies does not apply to the crime of first degree murder.

Appeal from the District Court for Jefferson County: WILLIAM B. RIST, Judge. Affirmed.

Toney J. Redman for appellant.

Don Stenberg, Attorney General, and Elaine A. Chapman for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The defendant, Joseph Edgar White, was convicted by a jury of first degree felony murder in the death of 68-year-old Helen Wilson on February 5, 1985. He was sentenced to life

imprisonment and has appealed to this court, contending the district court erred in failing to dismiss the charge because prosecution for the underlying felonies (robbery and sexual assault) was barred by the statute of limitations.

The record shows that on the night of February 5, 1985, White, James Dean, Thomas Winslow, Ada JoAnn Taylor, and Debra Shelden forcibly entered the victim's apartment in Beatrice for the purpose of robbing her. A sixth accomplice, Kathy Gonzalez, entered the apartment during the course of the robbery. The record shows that White participated in at least four planning sessions concerning this incident. During those discussions, White proposed sexually assaulting Mrs. Wilson as well as robbing her.

Most of the details of the Wilson homicide are set out in *State v. Dean*, 237 Neb. 65, 464 N.W.2d 782 (1991). Specifically, Mrs. Wilson was forced into her bedroom and was threatened and physically abused when she refused to tell the intruders where she kept her money. She was then forced back to the living room, screaming and kicking, and either tripped or was pushed to the floor. At this point, White and Winslow took turns sexually assaulting Mrs. Wilson. According to Taylor, White had vaginal intercourse with the victim, saying that she "deserved it," while Winslow held the victim's legs. Winslow then sodomized the victim while White held her down. Meanwhile, Taylor suffocated Mrs. Wilson with a pillow.

Mrs. Wilson did not move after she was raped, and appeared to be either dead or near death. The intruders proceeded to search the apartment for money. Taylor went into the kitchen and made some coffee for White and Winslow. Dean testified that after they left the apartment building, there was a general conversation between Taylor and White "about how nice it was to do it. They would do it again. It was fun. If they had the opportunity, they would do it again." White, Taylor, Winslow, and Dean then went to a truckstop and had breakfast.

When Mrs. Wilson's body was found the next morning by her brother-in-law, she had a complete fracture through the lower part of the left humerus, fractured ribs, a fractured sternum, a 2-centimeter vaginal tear, and numerous bruises, abrasions, and scratches. Her hands were loosely tied with a

towel, and a scarf was tightly wrapped around her head and tied.

On March 14, 1989, the Gage County Attorney filed a complaint against White, charging that on February 6, 1985, in Gage County, Nebraska, White did "kill Helen L. Wilson in the perpetration or attempt to perpetrate a sexual assault in the first degree." White was arrested pursuant to a warrant on March 16, 1989, near Cullman, Alabama, and was returned to Nebraska for trial. On April 4, 1989, an amended complaint was filed, charging that White, on or about February 6, 1985, in Gage County, Nebraska, did "kill Helen Wilson in the perpetration of or attempt to perpetrate any sexual assault in the first degree, robbery, kidnapping or burglary."

On May 17, 1989, the defendant moved to dismiss the amended complaint "for the reason that the felony murder charge requires conviction of the felony and the prosecution of the felonies are [sic] all barred under § 29-110 which requires that the complaint be filed within three years of the offense." The motion was denied on June 19, 1989. During White's arraignment in district court on July 3, 1989, the State was given leave to strike the word "kidnapping" from the information instanter.

The sole question presented in this appeal is whether the running of the 3-year statute of limitations on an underlying felony bars a prosecution for first degree felony murder pursuant to Neb. Rev. Stat. § 28-303(2) (Reissue 1989).

Section 28-303 provides that a person commits murder in the first degree if he kills another person "(1) purposely and with deliberate and premeditated malice, or (2) in the perpetration of or attempt to perpetrate any sexual assault in the first degree, arson, robbery, kidnapping, hijacking of any public or private means of transportation, or burglary . . . ." Neb. Rev. Stat. § 29-110 (Reissue 1985) provides that no person "shall be prosecuted for any felony, excepting only treason, *murder*, arson and forgery, unless the indictment for the same shall be found by a grand jury within three years next after the offense shall have been done or committed . . . ." (Emphasis supplied.)

Section 29-110 specifically excepts the crime of murder from the 3-year statute of limitations for felony prosecutions. See,

Jackson v. Olson, 146 Neb. 885, 22 N.W.2d 124 (1946); *State v. Keithley*, 236 Neb. 631, 463 N.W.2d 329 (1990). Under § 28-303, one may commit first degree murder either by committing premeditated murder or by killing another person while in the commission of certain felonies. *State v. Buckman*, 237 Neb. 936, 468 N.W.2d 589 (1991). The State need not prove premeditation and malice when the victim's death is caused by the defendant in the course of the defendant's commission of one of the felonies enumerated in § 28-303(2). *Id.* See, *State v. Bradley*, 210 Neb. 882, 317 N.W.2d 99 (1982); *State v. Hubbard*, 211 Neb. 531, 319 N.W.2d 116 (1982). See, also, *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991). A plurality of the U.S. Supreme Court recently upheld these principles in *Schad v. Arizona*, ____ U.S. ____, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991), noting that there was widespread acceptance of the two mental states as alternative means of satisfying the mens rea element of the single crime of first degree murder.

In the present case, the defendant was charged with first degree murder, not with robbery, burglary, or sexual assault. Section 28-303(2) requires only that the killing occur during the perpetration of a specified felony, and the defendant need not be charged and convicted of an underlying felony in order to be convicted of first degree murder pursuant to § 28-303(2). Accordingly, the 3-year statute of limitations generally applicable to the underlying felonies charged in this case does not apply to the charged crime of first degree murder.

The defendant's assignment of error is without merit, and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. SHIRLEY L. TINGLE, APPELLANT.

477 N.W.2d 544

Filed November 22, 1991. No. 90-538.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings of fact are clearly erroneous.
2. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed witnesses testifying in regard to such motion.
3. **Police Officers and Sheriffs: Arrests: Jurisdiction.** The power of a police officer at common law to make an arrest without a warrant is limited to the boundaries of the governmental unit by which he was appointed, unless the police officer is acting in fresh and continued pursuit of a suspected felon who has committed an offense in the officer's presence and within his territorial jurisdiction.
4. **Police Officers and Sheriffs: Arrests: Jurisdiction: Statutes.** A local peace officer acting outside the territorial limits of the jurisdiction under which he holds office is without official power to apprehend an offender, unless he is authorized to do so by state statute.
5. **Police Officers and Sheriffs: Arrests: Drunk Driving: Jurisdiction: Statutes.** There is no Nebraska statute authorizing a police officer of a city of the second class to arrest a suspect for misdemeanor driving while under the influence of alcohol outside the officer's geographical jurisdiction.
6. **Statutes.** Interpreting a statute is a question of law.
7. **Appeal and Error.** On questions of law, the Supreme Court has an obligation to reach a conclusion independent of that reached by the trial court.
8. **Statutes: Legislature: Intent.** The obligations of the court in consideration and application of a statute is to determine and give effect to the purpose and intention of the Legislature as ascertained from the entire language thereof considered in its plain, ordinary, and popular sense.
9. **Statutes.** Statutes which effect a change in the common law or take away a common-law right should be strictly construed.
10. _____. In construing a statute, courts will try to avoid a construction which lends itself to an absurd, unjust, or unconscionable result.
11. **Police Officers and Sheriffs: Misdemeanors: Jurisdiction: Case Overruled.** To the extent that *State v. Green*, 236 Neb. 33, 458 N.W.2d 472 (1990), implies that fresh pursuit outside an officer's geographical jurisdiction is applicable to misdemeanor suspects, it is overruled.
12. **Constitutional Law: Search and Seizure: Evidence: Trial.** Evidence obtained as the fruit of an illegal search or seizure, in violation of the fourth amendment to the U.S. Constitution and Neb. Const. art. I, § 7, is inadmissible in a state prosecution and must be excluded.
13. **Criminal Law: Arrests.** Although the illegality of the arrest in question gives rise

to collateral rights and remedies such as the exclusionary rule, it ordinarily is not a defense to the crime for which the arrest is made.

14. **Motions to Dismiss.** The act of a defendant in adducing evidence after the defendant's motion to dismiss is overruled at the close of the State's evidence operates as a waiver of any error in the trial court's overruling of the motion.

Appeal from the District Court for Antelope County, MERRITT C. WARREN, Judge, on appeal thereto from the County Court for Antelope County, STEPHEN P. FINN, Judge. Judgment of District Court reversed, and cause remanded with directions.

Mark A. Johnson for appellant.

Robert M. Spire, Attorney General, and Donald E. Hyde for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Claiming that evidence obtained after she was arrested should have been suppressed, Shirley L. Tingle appeals her conviction for second-offense driving while under the influence of alcohol (DWI). She originally was convicted in the Antelope County Court. Tingle appealed to the district court for Antelope County, which affirmed the defendant's conviction.

We agree with Tingle that in the absence of statutory authority it is not permissible for a police officer in a city of the second class to pursue and arrest a misdemeanant suspect beyond the limits of the officer's geographical jurisdiction.

Since Tingle was arrested outside the arresting officer's geographical jurisdiction, evidence obtained as a result of the defendant's arrest should have been suppressed. We therefore reverse the conviction and remand the cause to the district court, with instructions to remand it to the trial court for a new trial.

The record reflects that on August 31, 1989, at approximately 2 p.m., Officer Arvin Brandt of the Neligh Police Department received a radio dispatch requesting his presence at the Antelope County sheriff's office. Upon reaching that office, Brandt met Thomas Lanz, an insurance adjuster for Farm Bureau Insurance Company, who reported

that Tingle had been in his place of business and appeared intoxicated. Lanz observed that Tingle did not park her car straight in front of his office, that she was unsure of her footing as she walked into his office, that she had trouble opening the door, and that, once inside, Tingle's speech was slurred while she conversed with Lanz. Lanz described Tingle's automobile to Brandt, although the officer already knew the vehicle Tingle drove.

Brandt located the vehicle, parked in downtown Neligh, a city of the second class. The officer parked his cruiser and waited for Tingle to return to her vehicle. When Tingle returned to her vehicle, Brandt observed her as she drove first back to the insurance office momentarily and then west away from Neligh. Brandt followed immediately behind the defendant's vehicle. While within the city limits, Brandt observed Tingle's vehicle weave twice across the white line on the shoulder of the road about half the width of her vehicle and then twice across the centerline, once at least one-fourth the width of her vehicle. Brandt activated his overhead lights in an attempt to stop the defendant. Tingle passed another vehicle, at which time Brandt turned on his siren. Tingle failed to stop until she was 3 miles outside the Neligh city limits. Her speed hit 72 m.p.h. in a 55-m.p.h. zone. It was approximately 2:30 p.m. when Tingle was stopped on the highway.

Upon approaching the defendant's vehicle, Brandt noticed a slight odor of alcohol about Tingle. When asked to produce her driver's license, Tingle fumbled through her billfold and produced a credit card. Then, in the presence of a sheriff's deputy and a matron who had arrived at the scene at Brandt's request, Brandt asked Tingle to step out of the car and perform two field sobriety tests. After she failed these tests, Brandt placed Tingle under arrest for DWI and transported her to the sheriff's office. After signing an implied consent form, Tingle was given a breath test at 3:06 p.m. That showed a result of .188 grams of alcohol per 210 liters of Tingle's breath. Neb. Rev. Stat. § 39-669.07(3) (Reissue 1988) provides in substance that it shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle "[w]hen such person has a concentration of ten-hundredths of one gram or more by

weight of alcohol per two hundred ten liters of his or her breath."

Tingle was charged with DWI, second offense, a Class W misdemeanor under § 39-669.07. Her motion to suppress evidence obtained as a result of her arrest was overruled. Subsequently, a jury found Tingle guilty of driving while under the influence of alcohol, and thereafter, the court found the conviction to be Tingle's second offense. The defendant was sentenced to 30 days in jail and fined $500, and her driver's license was suspended for 1 year. The district court for Antelope County affirmed Tingle's conviction and sentence, and the defendant timely appealed to this court.

In her first assignment of error, Tingle claims that

> the lower court erred by failing to suppress any and all evidence obtained from the defendant, including statements by defendant, breath test results and officers' observations after defendant's arrest, as such arrest was made by an officer of the city of Neligh, Nebraska, outside the officer's jurisdiction to arrest, and as such such evidence was seized as the result of an exploitation of an illegal arrest.

In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings of fact are clearly erroneous. *State v. Gibbs*, 238 Neb. 268, 470 N.W.2d 558 (1991). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed witnesses testifying in regard to such motion. *State v. Walker*, 236 Neb. 155, 459 N.W.2d 527 (1990).

> "[T]he power of a police officer at common law to make an arrest without a warrant is limited to the boundaries of the governmental unit by which he was appointed, unless the police officer is acting in fresh and continued pursuit of a suspected felon who has committed an offense in the officer's presence and within his territorial jurisdiction."

Com. v. O'Hara, 30 Mass. App. 608, 609, 571 N.E.2d 51, 52 (1991), quoting *Commonwealth v. Grise*, 398 Mass. 247, 496 N.E.2d 162 (1986). It is clear that the common-law exception of "fresh pursuit" does not apply to Tingle's case. As stated, DWI under § 39-669.07 is a misdemeanor, whereas common-law fresh pursuit is limited to felonies.

There being no authority under common law to arrest a misdemeanant suspect outside an officer's geographical jurisdiction, the State must rely upon statutory authorization to prove that Tingle's arrest was lawful. See *Perry v. State*, 303 Ark. 100, 102, 794 S.W.2d 141, 142 (1990) ("[a] local peace officer acting without a warrant outside the territorial limits of the jurisdiction under which he holds office is without official power to apprehend an offender, unless he is authorized to do so by state statute"). Other states have allowed extraterritorial misdemeanor arrests under statutes that include (1) allowing the fresh pursuit of a misdemeanant outside a jurisdiction by express statutory language, see, *Inc. County of Los Alamos v. Johnson*, 108 N.M. 633, 776 P.2d 1252 (1989); *State v. Englehardt*, 465 So. 2d 1366 (Fla. App. 1985); *State v. Cochran*, 372 A.2d 193 (Del. 1977); *State, Department of Public Safety, v. Douglas Kaye Nystrom*, 299 Minn. 224, 217 N.W.2d 201 (1974); and *City of Scottsdale v. Kokaska*, 17 Ariz. App. 120, 495 P.2d 1327 (1972), or by language sufficiently broad to encompass misdemeanors, see, *People v. Carraher*, 199 Ill. App. 3d 965, 557 N.E.2d 975 (1990); *Commonwealth v. LeBlanc*, 407 Mass. 70, 551 N.E.2d 906 (1990); *Com. v. Fetsick*, 392 Pa. Super. 264, 572 A.2d 793 (1990); *City of Junction City v. Riley*, 240 Kan. 614, 731 P.2d 310 (1987), *appeal dismissed* 482 U.S. 911, 107 S. Ct. 3179, 96 L. Ed. 2d 669, *cert. denied* 482 U.S. 917, 107 S. Ct. 3191, 96 L. Ed. 2d 679; and *State v. McCarthy*, 123 N.J. Super. 513, 303 A.2d 626 (1973); and (2) allowing police officers to arrest as private citizens when outside their jurisdiction, see, *State v. Littlewind*, 417 N.W.2d 361 (N.D. 1987); *Windschitl v. Commissioner of Public Safety*, 355 N.W.2d 146 (Minn. 1984); and *People v. Bashans*, 80 Mich. App. 702, 265 N.W.2d 170 (1978).

In Nebraska, all of the above possibilities are inapplicable. Nebraska's Uniform Act on Fresh Pursuit applies only to police

officers from another state entering this state. See, Neb. Rev. Stat. §§ 29-416 to 29-421 (Reissue 1989). For intrastate fresh pursuit, resort must be had to the common law, which, as previously stated, only includes felonies. There is no Nebraska statute authorizing a police officer of a city of the second class to arrest a suspect for a misdemeanor DWI outside the officer's geographical jurisdiction. Nebraska's private-citizen statute allows warrantless arrests by a person not an officer only for felonies or petit larceny. Neb. Rev. Stat. § 29-402 (Reissue 1989).

In essence, the State argues that Neb. Rev. Stat. § 17-118 (Cum. Supp. 1990) extends the jurisdiction of police officers for cities of the second class to that of the sheriff in the county in which they operate. Section 17-118 provides:

> The police officers of the city shall have *power* to arrest all offenders against the laws of the state or of the city, by day or by night, in *the same manner* as the sheriff and to keep such offenders in the city prison or other place to prevent their escape until trial can be had before the proper officer.

(Emphasis supplied.) Similar statutes are found for all other classes of Nebraska cities. See, Neb. Rev. Stat. §§ 14-605 (Reissue 1987) (metropolitan class), 15-326 (Cum. Supp. 1990) (primary class), and 16-323 (Cum. Supp. 1990) (first class).

Interpreting a statute is a question of law. *State v. Ewing*, 221 Neb. 462, 378 N.W.2d 158 (1985). On questions of law, the Supreme Court has an obligation to reach a conclusion independent of that reached by the trial court. *State v. Jacobsen*, 238 Neb. 511, 471 N.W.2d 427 (1991); *Billups v. Nebraska Dept. of Corr. Servs. Appeals Bd.*, 238 Neb. 39, 469 N.W.2d 120 (1991). The obligation of the court in consideration and application of a statute is to determine and give effect to the purpose and intention of the Legislature as ascertained from the entire language thereof considered in its plain, ordinary, and popular sense. *Adkisson v. City of Columbus*, 214 Neb. 129, 333 N.W.2d 661 (1983). Statutes which effect a change in the common law or take away a common-law right should be strictly construed. *Mason v. Schumacher*, 231 Neb. 929, 439 N.W.2d 61 (1989).

The flaw in the State's reasoning is the distinction between power, duty, and jurisdiction. Loosely translated in their plain, ordinary, and popular sense, these elements correspond to "what the police may do," "what they must do," and "where they may do it." This distinction is clearly laid out in Neb. Rev. Stat. § 81-2006 (Reissue 1987), which refers to the State Patrol and states: "Performance of all duties, powers, and exercise of jurisdiction . . . shall extend to all freeways . . . ." It is only the cities of the metropolitan class that are covered by a statute which specifically extends the jurisdiction of police officers beyond that of the common law. Neb. Rev. Stat. § 14-603 (Reissue 1987) provides that the chief of police's "jurisdiction and that of his or her officers in the service of process in all criminal cases and in cases for the violation of city ordinances shall be coextensive with the county." It is clear that § 17-118 and similar statutes do not provide countywide jurisdiction for police officers. These statutes merely refer to the "power" to make certain arrests. See *State v. LeBlanc*, 149 Vt. 141, 540 A.2d 1037 (1987), where the court refused to interpret a general statute to provide police officers statewide jurisdiction similar to that of sheriffs, absent explicit statutory language. Absent statutory or common-law authority, city police officers may not make warrantless misdemeanor arrests outside their jurisdiction. See, e.g., Neb. Rev. Stat. § 23-1704 (Reissue 1987) (sheriffs do have power to summon assistance).

In support of its proposition that § 17-118 does confer countywide jurisdiction, the State cites *State v. Carpenter*, 181 Neb. 639, 150 N.W.2d 129 (1967), *cert. denied* 392 U.S. 944, 88 S. Ct. 2288, 20 L. Ed. 2d 1406 (1968), which raised the issue of whether police officers had the right to stop a defendant's vehicle outside the city limits. In *Carpenter, supra*, police officers in Blair, Nebraska, had instructions to note any suspicious vehicles in the area because of a rash of local burglaries. Sometime between 3 and 3:30 a.m. two officers noticed a vehicle licensed in another county slowly cruising the streets of Blair. It appeared that the driver attempted to evade the officers when they approached the vehicle. The officers finally stopped the vehicle outside the city limits. When one of the occupants exited the vehicle, his feet struck something that

gave off a metallic sound. The officers looked through the open door and saw pry bars. The defendant complied with a request of the officers that he drive his car to the police station in Blair. It was at the police station that the defendant was arrested and subsequently charged with two separate felonies. Despite the State's contentions, *Carpenter, supra*, is clearly distinguishable from the case at bar. That action did not involve an arrest outside the officers' jurisdiction. This court held that although the defendant was stopped outside the city limits, he was not arrested until he arrived at the Blair police station. Secondly, the arrest was for two felonies, possession of burglary tools and breaking and entering, not for misdemeanors. Finally, specific statutory reliance for the stop was made on Neb. Rev. Stat. § 29-829 (Reissue 1989), which provides in part:

> A peace officer may stop any person in a public place whom he reasonably suspects of committing, who has committed, or who is about to commit a crime and may demand of him his name, address and an explanation of his actions. When a peace officer has stopped a person for questioning pursuant to this section and reasonably suspects he is in danger of life or limb, he may search such person for a dangerous weapon. If the peace officer finds such a weapon . . . he may . . . arrest such person.

To whatever extent § 29-829 arguably allows for extraterritorial stops, it only allows arrests for possession of dangerous weapons and is thus inapplicable to the facts of this case. The defendant does not claim error with respect to the initial investigative stop.

The State also relies upon *State v. Green*, 236 Neb. 33, 41, 458 N.W.2d 472, 477 (1990), in which this court in dicta remarked that a jury instruction which stated, " 'A city police officer has the authority to stop and arrest a person outside the city limits if a misdemeanor offense was committed in his presence within the city limits,' " correctly stated the law. This case is distinguishable because the defendant in *Green, supra*, conceded the instruction was a correct statement of the law, and no authority was given for its proposition. As previously stated in this action, fresh pursuit in Nebraska is not applicable to misdemeanors. To the extent that *State v. Green, supra*, implies

that fresh pursuit outside the officer's geographical jurisdiction is applicable to misdemeanor suspects, it is overruled.

In *State v. O'Kelly*, 175 Neb. 798, 124 N.W.2d 211 (1963), *cert. denied* 376 U.S. 956, 84 S. Ct. 978, 11 L. Ed. 2d 975 (1964), this court recognized that evidence obtained as the fruit of an illegal search or seizure, in violation of the fourth amendment to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, is inadmissible in a state prosecution and must be excluded. See, also, *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). After concluding that, as a matter of law, Officer Brandt was without statutory or common-law authority to make the questioned arrest, we hold that the arrest was constitutionally illegal and that the trial court was clearly wrong in not suppressing all evidence obtained subsequent to such arrest.

Although the illegality of the arrest in question gives rise to collateral rights and remedies such as the exclusionary rule recognized in *O'Kelly, supra*, it ordinarily is not a defense to the crime for which the arrest is made. See *State v. Knudsen*, 201 Neb. 584, 270 N.W.2d 926 (1978). See, also, *State v. Smith*, 207 Neb. 263, 298 N.W.2d 162 (1980) (illegality of arrest does not deprive State of opportunity to prove guilt through the introduction of untainted evidence). Here, the validity of the arrest is of no consequence so far as the prosecution of the offense is concerned. See, e.g., *State v. Green*, 238 Neb. 328, 342, 470 N.W.2d 736, 748 (1991):

> It is not necessary for a conviction for driving under the influence of alcoholic liquor that a sample of blood, breath, or urine show a certain concentration of alcohol in a defendant's blood, breath, or urine, as those are alternate offenses under § 39-669.07. [Citations omitted.] "Either a law enforcement officer's observations of a defendant's intoxicated behavior or the defendant's poor performance on field sobriety tests constitutes sufficient evidence to sustain a conviction of driving while under the influence of alcoholic beverages. . . ."

For purposes of remand we note that the arrest did not occur until after Tingle failed the field sobriety tests. There is evidence in the record sufficient to support the conclusion that the police

officer did not intend to arrest Tingle until after she failed the sobriety tests. See *State v. Prahin*, 235 Neb. 409, 413, 455 N.W.2d 554, 558 (1990) ("person is seized within the meaning of the fourth amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave").

Based on the foregoing analysis this court concludes that the trial court was clearly wrong in finding that the police officer had authority to arrest the defendant, and in failing to apply the exclusionary rule to evidence received subsequent to Tingle's arrest.

In the defendant's second assignment of error, she claims that "the trial court erred in allowing into evidence results of the breath test upon defendant over objection of counsel as no expert testimony was given to show the correlation between a breath test result at 3:06 p.m. and what the defendant may have had in her breath at the time she was driving 40 minutes earlier." This court need not address the merits of this assignment of error because of the conclusion regarding the first assignment of error that such breath test result is inadmissible.

In her third and final assignment of error, the defendant claims that the trial court erred in failing to grant defendant's motion to dismiss at the end of the State's evidence. The act of a defendant in adducing evidence after the defendant's motion to dismiss is overruled at the close of the State's evidence operates as a waiver of any error in the trial court's overruling of the motion. *State v. Coburn*, 218 Neb. 144, 352 N.W.2d 605 (1984). See, also, *State v. Hellbusch*, 213 Neb. 894, 331 N.W.2d 815 (1983). Since the defendant adduced evidence after her motion was overruled and failed to renew the motion at the end of the defendant's evidence, the assigned error is meritless.

Since there is merit in the defendant's first assignment of error, we reverse, and remand this cause for a new trial not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

BOSLAUGH, J., dissenting.

I dissent from that part of the majority opinion holding that Neb. Rev. Stat. § 17-118 (Cum. Supp. 1990) does not empower police officers employed by cities of the second class to stop and

arrest suspected misdemeanants outside the city limits but within the county.

The jurisdiction of Nebraska police officers employed by cities of the second class to arrest criminal suspects is set out in § 17-118:

> The police officers of the city shall have the power to arrest all offenders against the laws of the state or of the city, by day or by night, *in the same manner as the sheriff* and to keep such offenders in the city prison or other place to prevent their escape, until trial can be had before the proper officer.

(Emphasis supplied.) Pursuant to Neb. Rev. Stat. § 23-1710 (Reissue 1987), it is the duty of the county sheriff "to preserve the peace *in his county*, to ferret out crime, to apprehend and arrest all criminals, and insofar as it is within his power, to secure evidence of all crimes committed *in his county*, and present the same to the county attorney and the grand jury . . . ." (Emphasis supplied.) Neb. Rev. Stat. § 29-404.02(2) (Reissue 1989) provides that a peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed a misdemeanor,

> and the officer has reasonable cause to believe that such person either (a) will not be apprehended unless immediately arrested, (b) may cause injury to himself or herself or others or damage to property unless immediately arrested, (c) may destroy or conceal evidence of the commission of such misdemeanor, or (d) has committed a misdemeanor in the presence of the officer.

Neb. Rev. Stat. § 49-801(15) (Reissue 1988) provides that city police officers are "peace officers."

The majority's position is in conflict with this court's decision in *State v. Carpenter*, 181 Neb. 639, 150 N.W.2d 129 (1967), *cert. denied* 392 U.S. 944, 88 S. Ct. 2288, 20 L. Ed. 2d 1406 (1968), that a city police officer had the authority to stop a suspected burglar "just across and outside the city limits" of Blair, Nebraska, pursuant to § 17-118. Significantly, the *Carpenter* court did not discuss the issue of the officer's geographical jurisdiction to detain a suspected felon in conjunction with "fresh pursuit," but based its decision on the

provisions of § 17-118. See, also, *Henning v. City of Hebron*, 186 Neb. 381, 183 N.W.2d 756 (1971), a workers' compensation case, holding that under § 17-118, a police officer of a city of the second class has the same powers and duties as a sheriff or constable and has the duty to apprehend and arrest felons and disturbers of the peace and to keep and preserve the peace within the whole area of his county.

The argument presented by the defendant in this case was similar to that considered and rejected in *Angel v. State*, 740 S.W.2d 727 (Tex. Crim. App. 1987). In *Angel v. State*, the defendant was arrested outside the city limits of Tomball, Harris County, Texas, by a Tomball city police officer after two officers saw him driving a piece of heavy road-paving equipment in the dark, without lights, on a public road. The officers were on routine patrol along the eastern edge of Tomball and were patrolling outside the city limits, but inside Harris County, when they stopped Angel. They noticed that the tractor Angel was driving appeared to have been "hot-wired," determined that there were two warrants issued against Angel in another county for speeding and failure to appear, and arrested Angel on the outstanding warrants and for investigation of possible theft. Angel was subsequently convicted of stealing the road-paving equipment.

Before trial, Angel moved to suppress all evidence seized as a result of his detention, arguing, in part, that the Tomball police officers acted outside their territorial jurisdiction by arresting him outside the Tomball city limits. The applicable Texas statutes provided that " '[a]ny peace officer is authorized to arrest without warrant any person found committing a violation of any provision of [the Uniform Act Regulating Traffic on Highways],' " and that " '[a] peace officer may arrest an offender without a warrant for *any offense* committed in his presence or within his view.' " (Emphasis in original.) 740 S.W.2d at 731. City police officers were "peace officers" under Texas law. *Id.* The Texas court found that it was against the law to drive road-paving equipment at night without headlights, that the Tomball police officers had probable cause to believe that a traffic offense had occurred within their view, and that the officers were authorized by statute to arrest Angel without a

warrant.

Regarding the issue of geographical jurisdiction, the Texas court observed that "statutes which confer upon a peace officer the authority to act may not necessarily define the geographic scope of that authority," *id.* at 732, and held that the legislative expression of a peace officer's jurisdiction must be found in some other statute or be controlled by common law. In this regard, Tex. Rev. Civ. Stat. Ann. art. 998 provided:

> "The city or town council in any city or town in this State . . . may, by ordinance, provide for the appointment, term of office and qualifications of such police officers as may be deemed necessary. . . . *Such officers shall have like powers, rights, authority and jurisdiction as are by said title vested in city marshals.* Such police officers may serve all process issuing out of a corporation court anywhere in the county in which the city, town or village is situated. . . ."

(Emphasis in original.) 740 S.W.2d at 732 n.13. Tex. Rev. Civ. Stat. Ann. art. 999 provided that " '[i]n the prevention and suppression of crime and arrest of offenders, [the city marshal] shall have, possess and execute like power, authority, and jurisdiction as the sheriff.' " (Emphasis omitted.) 740 S.W.2d at 733 n.13. Finally, Tex. Crim. Proc. Code Ann. art. 2.17 provided that " '[e]ach sheriff shall be a conservator of the peace *in his county* . . . .' " (Emphasis in original.) 740 S.W.2d at 733.

A divided court held that the term "jurisdiction" in the context of articles 998 and 999 referred to the geographic scope of a peace officer's power, rights, and authority, and that those statutes granted city marshals and city police officers countywide jurisdiction to arrest offenders.

We have held that the Legislature is presumed to have intended every statutory provision to have a meaning and that the Supreme Court will give effect, if possible, to every word, clause, and sentence thereof. See *Sorensen v. Meyer*, 220 Neb. 457, 370 N.W.2d 173 (1985). See, also, *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990). The majority's construction of § 17-118 fails to give reasonable effect to the

statute in its entirety and is merely repetitive of § 29-404.02, pursuant to which city police officers are specifically authorized to arrest suspected misdemeanants without a warrant under certain circumstances.

I would hold that the clause "in the same manner as the sheriff" found in § 17-118 gives a city police officer the same countywide jurisdiction as a sheriff to stop and arrest persons within the county and that the trial court did not err in failing to suppress evidence obtained after the defendant was arrested.

HASTINGS, C.J., and GRANT, J., join in this dissent.

STATE OF NEBRASKA, APPELLEE, V. DANIEL J. START, APPELLANT.
477 N.W.2d 20

Filed November 22, 1991. No. 90-656.

1. **Pleas: Waiver.** The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional.
2. **Pleas: Waiver: Indictments and Informations: Effectiveness of Counsel: Jurisdiction.** The only exceptions to the rule that the voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge are for the defenses of insufficiency of the indictment, information, or complaint; ineffective assistance of counsel; and lack of jurisdiction.
3. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.
4. **Sentences.** It is within the discretion of the trial court to impose consecutive rather than concurrent sentences for separate crimes.

Appeal from the District Court for Lancaster County: BERNARD J. MCGINN, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Scott P. Helvie for appellant.

Don Stenberg, Attorney General, Susan M. Ugai, and J. Kirk Brown for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and GRANT, JJ.

WHITE, J.

This is a criminal appeal case in which the defendant-appellant, Daniel J. Start, was originally charged in a four-count information in the Lancaster County District Court with robbery, in violation of Neb. Rev. Stat. § 28-324(1) (Reissue 1989); operating a motor vehicle to avoid arrest, in violation of Neb. Rev. Stat. § 28-905 (Reissue 1989); assault on an officer in the third degree, in violation of Neb. Rev. Stat. § 28-931 (Reissue 1989); and attempted assault on an officer in the second degree, in violation of Neb. Rev. Stat. §§ 28-201 and 28-930 (Reissue 1989). As part of a plea agreement, the State amended count I of the information to attempted robbery, in violation of §§ 28-201 and 28-324(1), and dismissed count II, operating a motor vehicle to avoid arrest. The State also agreed to dismiss a felony escape charge pending against Start in another case. In return, Start pled guilty to attempted robbery and no contest to both the third degree assault and the attempted second degree assault counts, as well as agreeing to plead guilty to charges of robbery and theft pending against him in Douglas County.

Prior to accepting Start's pleas the court explained Start's legal rights and the consequences of his pleas. Start was specifically instructed that no contest pleas are treated the same as guilty pleas for purposes of sentencing and that the court could order that any sentence imposed be served consecutively. Start was asked whether he understood what the State would have to prove for each charge to gain a conviction, and Start responded that he did. Based on Start's responses to the questions, the court found that Start was acting freely, voluntarily, and intelligently, and accordingly accepted the pleas.

Following a hearing the district court sentenced Start to terms of incarceration under the supervision of the Department of Correctional Services of not less than 4 nor more than 8 years on the attempted robbery count, not less than 20 months nor more than 5 years on the third degree assault count, and not less than 20 months nor more than 5 years on the attempted second degree assault count. The court ordered the sentences to run consecutively to each other and to the sentences imposed in the

Douglas County case. The court also granted Start credit for time served and ordered him to pay the costs of the action.

FACTS

Prior to accepting Start's pleas, the district court judge asked the State to summarize the factual basis for the charges and then asked Start to respond to that recitation. The parties' respective responses to those requests reveal the following:

During the early morning hours of July 24, 1989, Start entered a Kwik Shop in Lincoln, Nebraska, and demanded money from the cashier. Start did not have a weapon, but pretended to have one by sticking his finger under his jacket. When the cashier asked Start if he was kidding, Start may have threatened to "blow a hole" in the cashier unless he turned over the money, though Start denies making such a threat.

The cashier gave Start a small amount of money from the cash register, and Start left the store. The police were notified, and when Officer Brian Hoefer of the Lincoln Police Department saw a van traveling at a high speed in the area, he gave chase. The driver of the van was Start. Start eventually alighted from the van, and Hoefer continued his pursuit on foot, advising Start several times to stop. Hoefer eventually caught Start and, with his gun in his holster, attempted to physically restrain him.

Start resisted Hoefer's attempt to physically restrain him, and a struggle ensued, during which Hoefer heard Start exclaim, "I got your gun," noticed his gun was missing, and heard a gunshot. Start later admitted he fired the weapon, but stated that he fired into the air and did not intend to kill Hoefer. Hoefer then observed Start pointing the gun toward the officer's face. Hoefer grabbed the gun with both hands in an attempt to take it from Start. At this point Hoefer felt and observed Start attempting to pull the trigger. Throughout the struggle Hoefer repeatedly told Start to put the gun down. During this time Start also bit Hoefer twice on the arm. Finally, Hoefer convinced Start to turn over the gun, and Start did so.

As Officer Hoefer attempted to handcuff him, Start began thinking, "[N]ow I'm in trouble," and decided to try to get away again. He struck Hoefer in the face with his fist three

times before Hoefer was able to handcuff him. At that point other officers arrived and assisted in transporting Start to the police station.

ASSIGNMENTS OF ERROR

On appeal to this court, Start argues that the district court erred in (1) imposing consecutive sentences on the two assault charges, in violation of his right to be free from double jeopardy; (2) imposing an excessive sentence on the attempted robbery count, given the nature of the offense; and (3) imposing an excessive sentence by ordering all the sentences to run consecutively, particularly the sentences on the two assault counts.

DOUBLE JEOPARDY

In his first assignment of error, Start argues that the district court violated his constitutional right against double jeopardy by imposing consecutive sentences on the two assault charges despite the fact they arose out of the same transaction. We need not reach that issue, however, because Start waived the double jeopardy defense by pleading no contest to the assault charges in the district court.

The voluntary entry of a guilty plea or a plea of no contest waives every defense to a charge, whether the defense is procedural, statutory, or constitutional. *State v. Biernacki*, 237 Neb. 215, 465 N.W.2d 732 (1991); *State v. Phinney*, 235 Neb. 486, 455 N.W.2d 795 (1990); *State v. Kennedy*, 224 Neb. 164, 396 N.W.2d 722 (1986). The only exceptions are for the defenses of insufficiency of the indictment, information, or complaint; ineffective assistance of counsel; and lack of jurisdiction. *Phinney, supra*; *State v. Maeder*, 229 Neb. 568, 428 N.W.2d 180 (1988).

In *Maeder, supra*, the defendant pled guilty to kidnapping and first degree sexual assault. He was sentenced to 15 to 25 years' imprisonment on each count, the sentences to run consecutively. He appealed, arguing that because the charges arose out of the same transaction, the consecutive sentences subjected him to double jeopardy. This court held that the defendant waived the double jeopardy argument on appeal by voluntarily pleading guilty to the charges below.

Maeder is directly on point with this case. The district court judge carefully explained to Start the consequences of his pleas, including the possibility of consecutive sentences on the two assault charges. Start was represented by counsel at this time. The court found that the pleas were freely and voluntarily made, and Start does not dispute that finding here. Under well-settled rules of this court, Start waived the double jeopardy defense by pleading no contest to the assault charges and is therefore precluded from raising that issue on appeal.

Even if this court were to reach Start's double jeopardy argument, it is without merit. The record clearly indicates that Start committed two separate crimes against Officer Hoefer. He first committed an attempted assault in the second degree by pointing a gun toward Hoefer's face with his finger on the trigger. Later, as the result of a fresh impulse, he committed an assault in the third degree by punching Hoefer in the face three times with his fist. Though the offenses undoubtedly occurred during the same transaction, the imposition of a separate punishment for each offense does not violate principles of double jeopardy established in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), and *Grady v. Corbin*, ____ U.S. ____, 110 S. Ct. 2084, 109 L. Ed.2d 548 (1990).

EXCESSIVENESS OF THE SENTENCES

Start's remaining assignments of error combine to assert that the sentences imposed by the district court are excessive.

Start first argues that a sentence of 4 to 8 years' imprisonment on the attempted robbery count is excessive. Attempted robbery is a Class III felony, punishable by a term of imprisonment of from 1 to 20 years, a $25,000 fine, or both. §§ 28-324(2) and 28-201(4)(b) and Neb. Rev. Stat. § 28-105(1) (Reissue 1985). Start argues that, when separated from the incident involving Officer Hoefer, the holdup was relatively minor in that it involved no weapon and only a small amount of cash. While this may be the case, it is also true that the sentence imposed is at the low end of the statutory range, Start has a lengthy record of felony convictions, and these crimes occurred within a week after Start's release from prison for a prior

offense. A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court. *State v. Campbell, ante* p. 14, 473 N.W.2d 420 (1991). We find no abuse of discretion in the sentence imposed on the attempted robbery count.

Start also argues that the district court abused its discretion by ordering that the sentences imposed run consecutively rather than concurrently. It is within the discretion of the trial court to impose consecutive rather than concurrent sentences for separate crimes. *State v. Zaritz*, 235 Neb. 599, 456 N.W.2d 479 (1990), citing *State v. Sanders*, 235 Neb. 183, 455 N.W.2d 108 (1990). The charges involving Start's assaults on Officer Hoefer are very serious. The district court tempered its sentences to take into account the sentences imposed in Douglas County. Any further reduction would depreciate the seriousness of the crimes involved. Therefore, Start's remaining assignments of error are without merit.

AFFIRMED.

FAHRNBRUCH, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. DONALD MELTON, APPELLANT.
477 N.W.2d 154

Filed November 22, 1991. No. 90-699.

1. **Criminal Law: Verdicts: Appeal and Error.** The Supreme Court will not set aside a guilty verdict in a criminal case when such verdict is supported by relevant evidence. Only when evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt.
2. **Appeal and Error.** To be considered by the Supreme Court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred.
3. **Police Officers and Sheriffs: Assault.** A person commits the offense of assault on an officer in the third degree if he or she intentionally, knowingly, or recklessly causes bodily injury to a peace officer while such officer is engaged in the performance of his or her official duties.
4. **Police Officers and Sheriffs: Words and Phrases.** A deputy sheriff is a peace officer.

5. **Words and Phrases.** Physical pain is a bodily injury.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Affirmed.

Richard A. Koehler for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Unconvinced that the evidence supports the jury's finding that he is guilty of violating Neb. Rev. Stat. § 28-931(1) (Reissue 1989), assault on a peace officer in the third degree, Donald Melton appeals that conviction. For that felony, the defendant was sentenced to 18 months' imprisonment, the sentence to run consecutively to the sentences imposed upon Melton on other charges. We affirm the defendant's conviction on the assault charge.

The jury also convicted Melton of a second charge: damaging property owned by Fillmore County. The defendant has not appealed that conviction or the penalty imposed on that charge. We need, therefore, to discuss only Melton's conviction of assault upon a peace officer, third degree.

The Supreme Court will not set aside a guilty verdict in a criminal case when such verdict is supported by relevant evidence. Only when evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Martin*, *ante* p. 339, 476 N.W.2d 536 (1991).

About 6:30 p.m., January 6, 1990, a police officer and a deputy sheriff, while investigating a stolen truck report, observed Melton underneath a truck located in close proximity to a tire store in Geneva, Nebraska. The vehicle under which Melton was seen matched the description of the recently reported stolen truck. As the officers approached Melton, he began walking away from them. At that time, the defendant told Geneva police officer James Gewacke that he was going

home. Upon the officers' request, Melton accompanied Gewacke to the sheriff's office. Melton was not placed under arrest. The two law enforcement officers testified they merely wanted to talk to the defendant about the stolen truck.

Inside the sheriff's office, Melton began to take off his jacket. As he was doing this, Deputy Sheriff William Hogue, who had gone to the sheriff's office and was standing behind the defendant, observed that Melton was wearing a type of kitchen paring knife on his belt. Hogue reached forward and asked the defendant for the knife. Melton spun around. With an open hand, the defendant slapped Deputy Hogue on the right side of his face. The force of the blow knocked the eyeglasses Hogue was wearing 10 to 12 feet across the room. The defendant then slapped Hogue a second time, again on the right side of the deputy's face. When Melton attempted to strike Hogue a third time, the defendant caught a portable radio microphone attached to Hogue's jacket lapel. Hogue testified that following the first blow he felt pain and numbness in his right cheek.

Following presentation of the State's case in chief, the defendant moved for a directed verdict, claiming that (1) no evidence had been presented showing that Deputy Hogue had been acting in his official capacity when he was struck and that (2) there was no evidence that Deputy Hogue sustained bodily injury. When the motion was overruled, the defendant rested. After the jury was instructed, the case was submitted to it. The jury returned a verdict finding Melton guilty of assault on a peace officer, third degree.

On appeal, Melton does not assign as error or discuss whether Deputy Hogue was acting in his official capacity as a peace officer when he was struck by the defendant. To be considered by the Supreme Court, an error must be assigned and discussed in the brief of one claiming that prejudicial error has occurred. *State v. Keithley*, 238 Neb. 966, 473 N.W.2d 129 (1991). In this court, the defendant claims only that the trial court erred in submitting the assault on a peace officer in the third degree charge to the jury. Melton argues that there was insufficient evidence that Deputy Hogue suffered bodily injury as a result of the defendant's conduct and that thus the evidence

was insufficient to convict him.

Section 28-931 provides in part: "(1) A person commits the offense of assault on an officer in the third degree if he or she intentionally, knowingly, or recklessly causes bodily injury to a peace officer . . . while such officer . . . is engaged in the performance of his or her official duties." A deputy sheriff is a peace officer. See Neb. Rev. Stat. § 23-1704 (Reissue 1987). Physical pain is a bodily injury as defined by Neb. Rev. Stat. § 28-109(4) (Reissue 1989). Hogue testified he suffered physical pain as a result of Melton's slapping the deputy's right cheek. The blow was so forceful that it knocked the glasses Hogue was wearing across the room. From Deputy Hogue's testimony, the jury could find beyond a reasonable doubt that Melton caused bodily injury to the deputy. Melton's assignment of error is without merit.

AFFIRMED.

SCOTT D. HICKENBOTTOM, APPELLEE, V. JUDY L. HICKENBOTTOM, APPELLANT.

477 N.W.2d 8

Filed November 22, 1991. No. 90-1132.

1. **Actions: Stipulations.** Parties to litigation are bound by stipulations voluntarily made and are granted relief therefrom only under exceptional circumstances.
2. **Divorce: Minors: Stipulations.** Parties in a proceeding to dissolve a marriage cannot control the disposition of minor children by agreement.
3. **Parent and Child: Divorce: Words and Phrases.** A stepfather is the husband of a child's mother by virtue of a marriage subsequent to that of which the child is the offspring; a husband who divorces the mother of such a child is no longer the child's stepfather.
4. **Divorce: Courts: Jurisdiction: Minors.** The only statutory authority conferred on district courts to deal with children in dissolution actions is that contained in Neb. Rev. Stat. § 42-364 (Reissue 1988).
5. **Statutes.** In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning.
6. _____. When the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning.
7. **Visitation: Appeal and Error.** In a dissolution of marriage action,

determinations concerning visitation with a minor are initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's discretion, keeping in mind, however, that the trial judge observed and heard the witnesses and accepted one version of the facts rather than the other.

8. **Divorce: Courts: Jurisdiction: Parent and Child: Visitation.** Neb. Rev. Stat. § 42-364 (Reissue 1988) confers jurisdiction upon the district court in the course of dissolution proceedings to grant visitation rights to an ex-stepparent who stood in loco parentis to the former stepchild.
9. **Divorce: Courts: Stipulations: Visitation.** In dissolution proceedings the district court always has the power, based on the best interests of the child, to either approve or disapprove stipulations or agreements for visitation.
10. _____: _____: _____: _____. In dissolution proceedings the district court has a responsibility to make its own determination concerning matters of visitation, which responsibility cannot be forestalled by any agreements or stipulations of the parties.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Affirmed.

Rita L. Melgares, of Qualley & Associates, for appellant.

Phillip G. Wright, of Quinn & Wright, for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

In this dissolution of marriage action, the district court incorporated in its decree the stipulation of the parties that the petitioner-appellee husband, Scott D. Hickenbottom, have reasonable visitation with his former stepdaughter, a child born to the respondent-appellant wife, Judy L. Hickenbottom, on February 3, 1980, during an earlier marriage. The wife assigns the incorporation as error, asserting that she had rescinded the stipulation. We affirm.

The parties, who were married on May 18, 1984, produced two sons, one born on October 26, 1984, and the other on November 4, 1986. During the course of these proceedings, the parties executed a stipulation which made no provision for the younger boy, but gave the wife care, custody, and control of the older boy notwithstanding the fact he had been living with the husband. The stipulation also granted the husband reasonable visitation with the wife's daughter. At trial, the wife testified she

had been coerced into signing the stipulation because the husband told her he would allow the older boy to live with her if she agreed that he, the husband, could have visitation with her daughter.

The record establishes that the husband had lived with his former stepdaughter since she was approximately 2 years old. According to him, the girl's biological father had no contact with her and had paid nothing toward her maintenance. The husband testified that he, on the other hand, enjoyed a father-daughter relationship with her ever since she has been old enough to talk, saying that the girl "has been my daughter . . . ."

The husband also testified that he participated in raising his former stepdaughter in many ways. He disciplined her when she needed it, helped take care of her, cooked her meals, put her to bed, and attended her school plays and parent-teacher conferences. According to the husband, "[t]here was never reference to her as stepdaughter and she never referred to [him] as stepfather"; she calls him "daddy" and is known by his surname.

The husband further testified that he and his former stepdaughter have a mutual loving relationship and that they are quite attached to each other. The girl has been included in the husband's prior visitations with the parties' two boys in activities wherein the four have participated together as a family.

The wife admitted that the three children had "done activities together" and that her daughter likes the husband, but would not go so far as to say the daughter was fond of him.

When asked why she objected to the husband having visitation with the girl, she replied:

> First of all, it's not his child. It's just been me and [the daughter], we have our own life, he has his own life. I just want to get on with it. I don't want him coming and going when he pleases, you know. She was already abandoned, left —— I wouldn't say abandoned, but left by one father. I don't need it by a second father. I won't tolerate it from him. And his harassment, I won't tolerate it.

She also said she objected to the husband's "womanizing around," but this complaint is not elaborated upon.

The evidence persuaded the district court judge that it would be in the girl's best interests to visit with the husband. In so concluding, he noted that the only reasons advanced by the wife for a contrary result had nothing to do with the child's best interests but, rather, relied on the husband's lack of a blood relationship with the child and the wife's desire to get on with her own life without the husband.

We begin by observing that the wife is confused as to her right to rescind the stipulation she executed. As we recently reaffirmed, the parties to litigation are bound by stipulations voluntarily made and are granted relief therefrom only under exceptional circumstances. *White v. Mertens*, 225 Neb. 241, 404 N.W.2d 410 (1987). See, also, *State v. Wells*, 197 Neb. 584, 249 N.W.2d 904 (1977); *Martin v. Martin*, 188 Neb. 393, 197 N.W.2d 388 (1972). There is nothing in this record which demonstrates either the existence of the type of exceptional circumstances which would justify granting relief from the stipulation or that she entered into it other than voluntarily. It is obvious that she at one time during the course of the litigation made the judgment that in order not to have to litigate the issue of custody of the parties' older son, she would agree to give the husband the right to visit her daughter. Such a quid pro quo does not constitute coercion. The fact is that the wife simply changed her mind; a change of mind is not such an exceptional circumstance as to justify relief from a stipulation.

However, the wife's confusion in this regard is unimportant because, as she correctly argues, the parties in a proceeding to dissolve a marriage cannot control the disposition of minor children by agreement. *Hicks v. Hicks*, 223 Neb. 189, 388 N.W.2d 510 (1986); *Eliker v. Eliker*, 206 Neb. 764, 295 N.W.2d 268 (1980); *Koser v. Koser*, 148 Neb. 277, 27 N.W.2d 162 (1947). More is said later in this opinion about the factors to be considered when determining visitation issues.

A stepfather is the husband of a child's mother by virtue of a marriage subsequent to that of which the child is the offspring; thus, a husband who divorces the mother of such a child is no longer the child's stepfather. *Kogon v. Ulerick*, 12 Va. App. 595, 405 S.E.2d 441 (1991). Therefore, the threshold question in this case is whether the district court had jurisdiction to grant

the husband, as the ex-stepparent, the right to visit his former stepdaughter. Of the handful of jurisdictions which have examined this issue, most have concluded, on a variety of theories, that under appropriate circumstances, an ex-stepparent is entitled to visitation with a former stepchild.

Pennsylvania was apparently the first jurisdiction to examine the matter. In *Spells v. Spells*, 250 Pa. Super. 168, 378 A.2d 879 (1977), the Pennsylvania Superior Court held that an ex-stepfather could not be denied the right to visit his former stepchildren just because he lacked any blood relationship to them. In so holding, the court stated at 378 A.2d at 881:

> Clearly, a stepfather and his young stepchildren who live in a family environment may develop deep and lasting mutual bonds of affection. Courts must acknowledge the fact that a stepfather (or stepmother) may be the only parent that the child has truly known and loved during its minority. A stepparent may be as devoted and concerned about the welfare of a stepchild as a natural parent would be. Rejection of visitation privileges cannot be grounded in the mere status as a stepparent.

The *Spells* court discussed the status of one who may " 'put himself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption. . . .' " *Id.* According to the court at 378 A.2d at 882:

> A stepfather who lives with his spouse and her natural children may assume the status "in loco parentis". We may expect that a bond will develop between stepparent and stepchild; we, therefore, should protect that relationship by conferring rights of visitation. The departure of a stepfather from the home would no more destroy the love and affection between stepparent and child than it would in the case of a natural child.

In remanding the cause for a determination of the ex-stepfather's relationship with his former stepchildren, the *Spells* court indicated that a relevant factor in the determination would be whether the ex-stepfather had stood in loco parentis to his stepchildren. See, also, *Simpson v. Simpson*, 586 S.W.2d 33 (Ky. 1979) (adopting the in loco

parentis approach in holding that visitation with a surrogate parent may be in the child's best interests).

Utah used the same approach in *Gribble v. Gribble*, 583 P.2d 64 (Utah 1978). Therein, the ex-stepfather had treated the child in question as his own during the time the two lived together over about a 4-year period. After the divorce, at which time the child was 4 years old, the natural mother objected to any visitation by the ex-stepfather. The relevant Utah statute provided for visitation rights in " 'parents, grandparents and other relatives . . . .' " (Emphasis omitted.) *Id.* at 66. The *Gribble* court stated that while the preexisting stepparent relationship, in and of itself, did not confer any rights or obligations, the assumption of an in loco parentis status put the ex-stepfather in a different position, conferring upon him the same rights as a natural parent. Under this analysis, a former stepparent was within the terms of the statute. The opinion noted that divorce does not terminate the in loco parentis status, observing that "only the surrogate parent or the child is able to terminate the status at will, and the rights, duties, and obligations continue as long as they choose to continue the relationship." *Id.* at 67. The opinion also declared that "a stepfather standing in the status of loco parentis is given the opportunity to seek visitation rights as a right afforded a natural parent, that he should not be permitted to escape the duties and obligations of the loco parentis status as long as that relationship remains intact." *Id.* at 68. With that in mind, the *Gribble* court remanded the cause with directions to make a determination as to whether the right to visitation should be conditioned on a requirement that the ex-stepfather accept the obligation to assist in the financial support of the child.

In *Bryan v. Bryan*, 132 Ariz. 353, 645 P.2d 1267 (Ariz. App. 1982), the natural mother claimed that in a dissolution proceeding the court has "jurisdiction to determine custody only if both parties to the proceeding are parents of the child." *Id.* at 355, 645 P.2d at 1269. Arizona custody proceedings were controlled by a statute providing that " '[a] child custody proceeding is commenced in the superior court: 1. By a parent, by filing a petition: (a) For dissolution or legal separation; or (b) For custody of the child . . . .' " *Id.* Contrary to the mother's

contention that the statute was ambiguous and did not intend that child custody issues be determined in a dissolution proceeding unless both parties were parents of the child, the *Bryan* court concluded that, read literally, the statute meant that when the mother filed a petition for dissolution, she also commenced a child custody proceeding. The court defined the issue as being "whether a stepparent who stands *in loco parentis* to a stepchild may be granted visitation rights when the marriage of the stepparent and the child's natural parent is dissolved." *Id.* at 354, 645 P.2d at 1268. The two earlier statutes had granted jurisdiction to determine custody over the " 'minor children of the parties' " and the " 'children of the marriage,' " respectively. *Id.* at 355, 645 P.2d at 1269. The *Bryan* court reasoned that while this earlier language limited the jurisdiction of the court in custody determinations, the absence of such "limiting language" in the present statute rendered the mother's argument meritless. *Id.* at 356, 645 P.2d at 1270. The *Bryan* court recognized that its ruling departed from the declaration in 27B C.J.S. *Divorce* § 303 at 426 (1959) that "[i]n a divorce suit, the court does not have the power to provide for the care and custody of stepchildren, since there is no common obligation on the parties to the divorce suit for their support." The court concluded that this older rule arose "from an outmoded view that custody and visitation rights are primarily a benefit to the parent, to be enjoyed in compensation for the duty to support." 132 Ariz. at 356, 645 P.2d at 1270. The court went on to explain, however, that Arizona "has long recognized that in matters of child custody it is the welfare of the child, not the gratification of the parent, that is paramount . . . ." *Id.* The *Bryan* court also declared that "[t]he state has a legitimate interest in the welfare of any child whose home is being divided by its laws, and that interest is equally strong regardless of whether the marriage being dissolved is that of both, or only one, of the child's parents." *Id.* See, also, *Rhinehart v. Nowlin*, 111 N.M. 319, 323, 805 P.2d 88, 92 (N.M. App. 1990) (holding that the trial courts are given "exclusive jurisdiction of *all matters* relating to the guardianship, care, custody, maintenance and education of the children," which includes "the granting of visitation rights to a person or persons who the

trial court determines are significant and important to the welfare of the children" (emphasis in original)). But cf. *Olvera v. Superior Court,* 168 Ariz. 556, 815 P.2d 925 (Ariz. App. 1991) (holding court did not have jurisdiction to award custody, either permanent or temporary, to an ex-stepparent, since statute provided that petition for dissolution need only allege names of children "common to the parties," and thus reasonable to conclude jurisdiction in domestic relations cases limited to such children).

In *Carter v. Brodrick*, 644 P.2d 850 (Alaska 1982), an ex-stepfather appealed from a lower court's decision refusing him visitation with his former stepson. The relevant statute permitted a divorce court to make determinations regarding custody and visitation as to " 'any *child of the marriage.*' " *Id.* at 852. The Alaska Supreme Court reversed, and remanded the cause for a determination as to whether the ex-stepfather had stood in loco parentis to the former stepchild. In doing so, the *Carter* court went further than did the *Bryan* court. As noted earlier, the *Bryan* court specifically stated that Arizona's prior statutory language granting jurisdiction over "any child of the marriage" limited custody jurisdiction of the divorce court to children born to, or adopted by, the parties to the proceeding. In contrast, the *Carter* court held that "where a stepparent has assumed the status of in loco parentis, a stepchild is a 'child of the marriage' . . . ." *Id.* at 855. But see, *Perry v. Superior Court of Kern Cty.*, 108 Cal. App. 3d 480, 485, 166 Cal. Rptr. 583, 586 (1980) (holding statute granting jurisdiction over " 'minor children of the marriage' " conferred no jurisdiction to award visitation if the child not " 'of the marriage' "; concurring opinion suggests if ex-stepfather had alleged he had stood in loco parentis, jurisdiction may have existed); *Kogon v. Ulerick*, 12 Va. App. 595, 405 S.E.2d 441 (1991) (holding statute conferring authority to grant visitation to stepparent did not extend to ex-stepparent).

Oklahoma examined the issue of a former stepparent's right to visitation in *Looper v. McManus*, 581 P.2d 487 (Okla. App. 1978). Oklahoma did not adopt the in loco parentis approach but, rather, relied on determining what best serves the interests of the child. In granting an ex-stepmother visitation rights with

a former stepchild for whom she had provided care over a period of approximately 3 or 4 years, the court wrote at 488-89:

> Visitation is not solely for the benefit of the adult visitor but is aimed at fulfilling what many conceive to be a vital, or at least a wholesome contribution to the child's emotional well-being by permitting partial continuation of an earlier established close relationship.
>
> Usually such an affiliation is with a natural parent. But it need not be. Those involved with domestic relations problems frequently see situations where one who is not a natural parent is thrust into a parent-figure role, and through superior and faithful performance produces a warm and deeply emotional attachment.

See, also, *Honaker v. Burnside*, 388 S.E.2d 322, 326 (W. Va. 1989) (holding that best interests of child required that she have visitation with her former stepfather and half brother in order to "ensure that she is not stripped of the right to continue a close relationship with the people she considers her family"); *Temple v. Meyer*, 208 Conn. 404, 544 A.2d 629 (1988) (denying visitation rights to ex-stepfather, but holding that only relevant criterion under the third-party visitation statute is best interests of the child).

In *Shoemaker v. Shoemaker*, 563 So. 2d 1032, 1034 (Ala. Civ. App. 1990), the court held that "[t]here is no prohibition against a former stepparent seeking, and being awarded in appropriate circumstances, visitation privileges with their former stepchild if the best interests of a child are involved and brought to the attention of a trial court." The court did question whether visitation by an ex-stepparent would be in the best interests of the child if the visitation was against the wishes of the natural parent. It stated that its "review of the case law on the subject of 'former stepparent visitation privileges' reveal[ed] that *only* after the best interests and welfare are raised *and* shown to be advanced by such visitation, would a trial court then have the *discretion* to award such privileges." (Emphasis in original.) *Id.* "Such an award would not arise from the relationship or a legal privilege (as granted by statute to grandparents, § 30-3-3) but from the inherent power of the court to act to promote the best interests of a child." 563 So. 2d

at 1034.

In *Collins v. Gilbreath*, 403 N.E.2d 921 (Ind. App. 1980), the court also followed a best interests analysis, although it also hints at the importance of a special in loco parentis relationship. The trial court had awarded visitation rights to a former stepfather despite the lack of a specific request by either of the parties. The natural father of the three children contended that the visitation order was contrary to law, asserting that visitation with an unrelated third party in the form of a former stepfather was not authorized by Indiana law. In upholding the lower court's grant of visitation, the *Collins* court reviewed the law of other jurisdictions and discerned a common thread running through the cases: Where the custodial parent objects to visitation by a third party, the courts generally deny visitation rights. This was especially true "where the relationship between the parties is so strained as to affect the well-being of the child." *Id.* at 923. The court went on to state, however, that while it found the case law instructive, it was not determinative of the issue before it.

> When the judicial system becomes involved in family matters concerning relationships between parent and child, simplistic analysis and the strict application of absolute legal principles should be avoided. The mere protest of a parent who asserts that visitation by another person would somehow harm his or her child should not be enough to deny visitation in all cases. . . . This is especially true where the third party has cared for a child as his or her own.

Id. In reaching its decision the *Collins* court emphasized that the trial court had specifically noted that the ex-stepfather had cared for and loved the children as a father for 2 1/2 years. In addition, the court recognized that

> [t]o abruptly end this close relationship and deny him the privilege of ever seeing the girls again would be unfair and traumatic to both [the former stepfather] and the three young girls. The children would in essence lose their second parent in ten days—one by suicide and one by court decree.

Id. The *Collins* court made clear its decision was not intended to

open the door such as to allow the "granting of visitation rights to a myriad of unrelated third persons, including grandparents, who happen to feel affection for a child." *Id.* at 923-24. Rather, the court specifically limited its holding to similar factual situations wherein the party pursuing visitation had acted in a parental and custodial capacity. Compare *Evans v. Evans*, 302 Md. 334, 343, 488 A.2d 157, 162 (1985) (holding that "[w]hile an *in loco parentis* status may affect the court's determination as to the best interests of the child," such a relationship did not have to exist under Maryland law before a stepparent could be granted visitation rights).

With that background, we turn our attention to our own statutes. Neb. Rev. Stat. § 42-311 (1943) formerly granted the district courts jurisdiction to determine custody as to the "minor children of the parties." Today, the only statutory authority conferred on district courts to deal with children in dissolution actions is that contained in Neb. Rev. Stat. § 42-364 (Reissue 1988). *Meyers v. Meyers*, 222 Neb. 370, 383 N.W.2d 784 (1986). That statute, the constitutionality of which is not in question, provides, in relevant part:

> When dissolution of a marriage or legal separation is decreed, the court may include such orders in relation to any minor children and their maintenance as shall be justified, including placing the minor children in the custody of . . . third parties . . . . Custody and visitation of minor children shall be determined on the basis of their best interests.

§ 42-364.

Farmer v. Farmer, 200 Neb. 308, 263 N.W.2d 664 (1978), an action to modify a dissolution decree, is instructive on the question before us. One of the issues was whether the district court had jurisdiction to determine if the husband was the natural father of a child born prior to the marriage. In concluding that such jurisdiction existed, this court looked to § 42-364, as well as to the language of Neb. Rev. Stat. § 42-351 (Reissue 1988), which provides for the jurisdiction of the district court in divorce cases:

> (1) In proceedings under sections 42-347 to 42-379, the court shall have jurisdiction to inquire into such matters,

> make such investigations, and render such judgments and make such orders, both temporary and final, as are appropriate concerning the status of the marriage, the custody and support of minor children . . . .

§ 42-351. We also cited Neb. Rev. Stat. § 42-377 (Reissue 1988), which deals with the legitimacy of children, and held that "[t]he above-quoted statutes give the District Court complete jurisdiction over the custody, support, and welfare of all minor children who are touched upon by the divorce proceedings and all related issues." 200 Neb. at 310, 263 N.W.2d at 666. See, also, *State ex rel. Storz v. Storz*, 235 Neb. 368, 455 N.W.2d 182 (1990) (holding that full and complete general jurisdiction over the entire marital relationship and in all related matters, including child custody and support, is vested in district court in which petition for dissolution is properly filed).

In the absence of anything indicating to the contrary, statutory language is to be given its plain and ordinary meaning. When the words of a statute are plain, direct, and unambiguous, no interpretation is necessary or will be indulged to ascertain their meaning. *State v. Matthews*, 237 Neb. 300, 465 N.W.2d 763 (1991); *State v. Rios*, 237 Neb. 232, 465 N.W.2d 611 (1991). Section 42-364 specifically confers upon the district court jurisdiction to award custody to third parties pursuant to a decree of dissolution. As observed in *Carter v. Brodrick*, 644 P.2d 850 (Alaska 1982), it would be inconsistent to rule that the court has jurisdiction to grant custody to the stepparent but lacks jurisdiction to grant visitation.

We therefore conclude the district court had jurisdiction to award the husband rights of visitation with his former stepdaughter. The remaining question is whether it was appropriate for the district court to so order under the circumstances of this case.

We begin this aspect of our review by recalling that in a dissolution of marriage action, determinations as to custody of and visitation with minor children are matters initially entrusted to the discretion of the trial judge, whose determinations, on appeal, will be reviewed de novo on the record and affirmed in the absence of abuse of the trial judge's discretion, keeping in mind, however, that the trial judge

observed and heard the witnesses and accepted one version of the facts rather than the other. *Wyman v. Wyman*, 235 Neb. 287, 454 N.W.2d 692 (1990); *LeDoux v. LeDoux*, 234 Neb. 479, 452 N.W.2d 1 (1990); *Rice v. Rice*, 231 Neb. 428, 436 N.W.2d 518 (1989).

It is also appropriate to recall that the best interests of the child are the primary and paramount considerations in determining visitation rights. *Manewal v. Manewal*, 220 Neb. 867, 374 N.W.2d 39 (1985); § 42-364. This rule, long established in case law and now codified, imposes upon the court the responsibility to make its own determination concerning matters of visitation, which responsibility cannot be forestalled by any agreements or stipulations of the parties. *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991); *Lautenschlager v. Lautenschlager*, 201 Neb. 741, 272 N.W.2d 40 (1978). Thus, the trial court always has the power, based on the best interests of the child, to either approve or disapprove stipulations or agreements for visitation. *Lautenschlager v. Lautenschlager, supra.*

Section 42-364(1) provides, in relevant part, that the factors involved in considering the best interests of the children include, but are not limited to, "(a) [t]he relationship of the children to each parent prior to the commencement of the action or any subsequent hearing [and] (c) [t]he general health, welfare, and social behavior of the children."

In *Gerber v. Gerber*, 225 Neb. 611, 619, 407 N.W.2d 497, 503 (1987), we stated that a court is to determine

> the nature and extent of visitation rights on a case-by-case basis and may consider many factors and circumstances in each individual case, such as age and health of the child; character of the noncustodial parent; the place where visitation rights will be exercised; frequency and duration of visits; the emotional relationship between the visiting parent and the child; the likely effect of visitation on the child; availability of the child for visitation; likelihood of disrupting an established lifestyle otherwise beneficial to the child; and, when appropriate, the wishes of the child.

In situations similar to those presented by the case before us, some courts have held that the determination of what is in the

best interests of the child involves looking to whether the former stepparent stood in loco parentis with the child. See, e.g., *Simpson v. Simpson*, 586 S.W.2d 33 (Ky. 1979); *Spells v. Spells*, 250 Pa. Super. 168, 378 A.2d 879 (1977). See, also, *Shoemaker v. Shoemaker*, 563 So. 2d 1032 (Ala. Civ. App. 1990); *Temple v. Meyer*, 208 Conn. 404, 544 A.2d 629 (1988). Although the in loco parentis status is not specifically enumerated as a requirement in § 42-364, it is certainly a relevant inquiry in considering the relationship of the children to each parent. Requiring the existence of such a status as a condition to permitting visitation between a former stepparent and a child will help ensure that the door to visitation rights is not open to one merely because he or she has the legal title of stepparent. Thus, we hold that an ex-stepparent pursuing visitation with a former stepchild must establish that during the marriage, he or she acted as a parent to the child.

In *Austin v. Austin*, 147 Neb. 109, 112-13, 22 N.W.2d 560, 563 (1946), we adopted the following:

> "A person standing in loco parentis to a child is one who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation, without going through the formalities necessary to a legal adoption, and the rights, duties, and liabilities of such person are the same as those of the lawful parent. The assumption of the relation is a question of intention, which may be shown by the acts and declarations of the person alleged to stand in that relation." 46 C. J., Parent and Child, § 174, p. 1334.

The record shows that the husband had established an in loco parentis status with the former stepdaughter. He lived with her for almost 8 years. They referred to each other as father and daughter; there was a close and loving relationship between them; he was involved in her day-to-day care, including any necessary discipline; and he took an active interest in her education and other school activities.

The only reason the wife gives for objecting to the husband's visitation is that the stepdaughter is "not his child. It's just been me and [the daughter], we have our own life, he has his own life." The fallacy in this position, however, is that once the wife

married the husband, it was no longer just she and the girl; it has been she, the girl, the husband, and the two boys they produced.

The record convinces us, as it did the district court, that the wife is more interested in punishing the husband by denying him access to her daughter than she is in doing what serves the girl's best interests. The girl is not a piece of property; she is a living, breathing, and, as is any child, fragile person who is seemingly already distraught by the destruction of what she has known as her family. There is no need to further damage her by removing the emotional support of one who has cared for her during the marriage.

Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

FAHRNBRUCH, J., concurring in part, and in part dissenting.

Preliminarily, I agree with the majority's analysis that visitation with a stepchild may be granted to a stepparent who established the status of in loco parentis with the child while married to the child's natural parent.

Additional consideration of the in loco parentis doctrine requires that this cause be remanded to the trial court for further proceedings.

The term "in loco parentis" means in place of a parent, and a "person in loco parentis" is one who has assumed the status *and obligations* of a parent without formal adoption. *Gribble v. Gribble*, 583 P.2d 64 (Utah 1978). The common law concerning termination of loco parentis status is that only the surrogate parent or the child is able to terminate the status at will, and rights, duties, and obligations continue as long as they choose to continue the relationship. *Id.* Since the child in this case is of a tender age, she can only exercise her right to terminate a loco parentis status through a guardian ad litem. No separate guardian ad litem was appointed for her. Because the child's mother bartered the child's visitation with the child's stepfather to obtain the custody of the parties' elder son, her interests and her daughter's interests were in conflict. Likewise, since the stepfather was using both his son and his stepdaughter as

bargaining chips, the stepdaughter's and stepfather's interests were not the same.

As noted by the majority, the wife in this case allowed the stepfather visitation privileges with her natural daughter in return for her husband's giving her custody of the elder son of the parties. Under that type of bartering system, who represented the best interests of the daughter? The trial court did appoint a lawyer as an attorney and guardian ad litem "for the minor children of these parties." It is unclear from the record whether the lawyer was appointed as an attorney and guardian ad litem for only the parties' two sons or for the appellee's stepdaughter as well. Regardless of any guardian ad litem appointment, the parties should not have been permitted to barter either the rights of the elder son of the parties or those of his half sister.

The result of the bartering was reduced to a stipulation which was signed not only by the parties, but also by the guardian ad litem appointed by the court. Each party testimonially admitted their son's custody was granted to the mother conditioned upon the appellee's obtaining visitation rights with his stepdaughter. The trial judge was of the opinion that he could not legally order visitation of the stepdaughter with the appellee. He stated, "I can do something else that effectively provides the same thing, which I'm going to do, and I'm going to adopt the stipulation that they entered into and order that both parties comply with it." The trial judge then pointed out that if Mrs. Hickenbottom chose not to grant Mr. Hickenbottom visitation with her daughter, Mrs. Hickenbottom could be held in contempt of court.

The bartering of custody and visitation rights shown in this record involves the lives and emotions of young children and is nothing short of outrageous. It should be discouraged by this court in the strongest of terms. As we have declared previously, "[c]hildren have the right to be treated as interested and affected persons and not as pawns or chattel of either or both parents." *Hibbard v. Hibbard*, 230 Neb. 364, 366, 431 N.W.2d 637, 639 (1988). The mother's natural daughter and that child's half brother were merely pawns and chattel in this case.

Based upon the record, it is apparent that neither the lawyer

appointed as attorney and guardian ad litem for the parties' children nor the trial court considered the lawyer to be representing Mrs. Hickenbottom's natural daughter. First, no issue was raised by the guardian ad litem as to the liability of Mr. Hickenbottom for support for his minor stepdaughter. Had he done so, the guardian ad litem might well have had a conflict of interest concerning the parties' two sons and the appellee's stepdaughter. Secondly, the court stated, "I am not making any determination that there was any legal right on the [appellee] to have visitation [with his stepdaughter] other than he and his wife entered into an agreement and that agreement showed that that visitation would be in the best interests of the stepdaughter." There is no requirement in the dissolution decree for the appellee to provide child support or other support, such as medical insurance benefits, to his wife's natural daughter.

In the record, there is no indication that the about to be ex-stepfather is willing to continue completely his in loco parentis status. The appellee wants visitation privileges with his stepdaughter, but apparently wants to terminate any of the obligations attendant with an in loco parentis status. By dissolution of her mother and stepfather's marriage, appellee's stepdaughter is deprived of her stepfather's obligation to support her. See Neb. Rev. Stat. §§ 28-705 and 28-706 (Reissue 1989). The appellee has made no provision for his stepdaughter's support, nor did the trial court make any support provision from her stepfather for her. This may be an indication that the stepfather intended to terminate his loco parentis status. Obviously, by their bartering the visitation of one child against the custody of another, the principals in this dissolution proceeding acted in their own interests and gave scant consideration to the best interests of the mother's daughter born of a previous marriage. These facts alone required the trial court to appoint a separate guardian ad litem for the girl.

In *Gribble v. Gribble*, 583 P.2d 64 (Utah 1978), the stepfather offered to set up a trust fund for his stepson. But as in *Gribble*, the stepfather here made no offer to pay child support, and certainly he has no legal duty to do so after a marriage dissolution decree is entered unless he maintains his "loco

parentis" status. In *Gribble* the court declared:

> It may be that if a stepfather standing in the status of loco parentis is given the opportunity to seek visitation rights as a right afforded a natural parent, that he should not be permitted to escape the duties and obligations of the loco parentis status as long as that relationship remains intact. A hearing could determine not only the right to visitation, but could determine whether that right should be conditioned on a requirement that the stepfather accept an obligation to assist in the support of the child. This is not only consistent with the concept of loco parentis but may well be necessary to the child's welfare. *Loco parentis does not envision that a stepparent be permitted to enjoy the rights of a natural parent without also accepting the responsibilities that are incurred.*

(Emphasis supplied.) 583 P.2d at 68.

As stated in *Klipstein v. Zalewski*, 230 N.J. Super. 567, 553 A.2d 1384 (1988), the obligation to support and the right to visitation are correlative and the two legal tenets should be applied in pari materia. Holding a stepparent liable for child support may serve to discourage suits for visitation by one who, rather than wishing to preserve a relationship with a former stepchild, wishes only to annoy or harass a former spouse.

Visitation privileges of stepparents should not be granted lightly. As the *Klipstein* court declared:

> There must be some limits on stepparent visitation rights because in our society it is not difficult to conceive of a child having three, four or even more stepfathers and there are not enough days in a week for the child to have visitation with all of them. Frequently, there will be no satisfactory solution which will please everyone. Justice to both the stepfather and the child, which is the desired objective, can rarely be attained [in certain cases] because the interests of one can be satisfied in many cases only at the expense of the other. And if these competing interests cannot be reconciled, it is the rights of the stepfather which must fall.

230 N.J. Super. at 571, 553 A.2d at 1386.

Equally troubling in this case is the absence of the child's

biological father as a party to the dissolution action. The record reflects that his location was readily available. Although he may be completely indifferent to the child, nonetheless the biological father has a legal interest which he is entitled to protect should he wish to do so. We have held:

> " ' "Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. . . ." ' "

Koch v. Koch, 226 Neb. 305, 312, 411 N.W.2d 319, 323 (1987).

It is obvious that granting rights of visitation to a former stepparent may in some cases interfere with some rights of a biological parent who is not otherwise affected by the dissolution proceeding. For example, under some circumstances any rights of visitation granted the former stepparent might disrupt a natural parent's established schedule of visitation. Thus, a stepparent seeking visitation rights with one about to become a former stepchild should be required to join as a party to the dissolution action the otherwise not affected biological parent of the child.

In this case it is conceivable that the biological father may have forfeited any rights he had as the natural parent of appellee's stepdaughter. However, that is not a determination that can be made without giving appropriate notice to the biological father and an opportunity for him to be heard.

This case should be remanded to the trial court, where, after notice to the biological father of the minor child involved and the appointment of a separate guardian ad litem for the child, a determination should be made as to whether the appellee wishes to continue his status of loco parentis to his ex-stepdaughter not only by exercising the privilege of visitation, but also by assuming the obligations of that status. Should Mr. Hickenbottom desire to maintain his loco parentis status and should the trial court find that it is in the best interests of the child that the status of appellee as loco parentis be maintained, then the trial court should require the appellee to appropriately

support the child.

WHITE, J., joins in this concurrence and dissent.

STATE OF NEBRASKA, APPELLEE, V. BENNY R. FOSTER, APPELLANT.
476 N.W.2d 923

Filed November 22, 1991. No. 90-1139.

1. **Sentences: Judges: Time.** That a sentence validly imposed takes effect from the time it is pronounced and a subsequent sentence fixing a different term is a nullity does not mean that a judge may never correct an inadvertent mispronouncement of a sentence.
2. **Sentences: Judges: Records.** The circumstances under which a judge may correct an inadvertent mispronouncement of a sentence are limited to those instances in which it is clear that the defendant has not yet left the courtroom, it is obvious that the judge, in correcting his or her language, did not change in any manner the sentence originally intended, and no written notation of the inadvertently mispronounced sentence was made in the records of the court.

Appeal from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Affirmed.

Robert P. Lindemeier, of Ruff, Florom & Nisley, for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Defendant-appellant, Benny R. Foster, urges that the district court, through the Honorable Jack H. Hendrix, erred in changing its original sentence. We affirm.

Pursuant to pleas entered in accordance with an agreement with the plaintiff-appellee State, Foster was adjudged guilty in each of two cases. In district court case No. 13,819, he was adjudged guilty of third degree assault on an officer, in violation of Neb. Rev. Stat. § 28-931 (Reissue 1989), a Class IV felony punishable by imprisonment for up to 5 years, Neb. Rev.

Stat. § 28-105 (Reissue 1989). In district court case No. 13,840, he was adjudged guilty of attempted criminal mischief, in violation of Neb. Rev. Stat. §§ 28-201 and 28-519 (Reissue 1989), a Class I misdemeanor punishable by imprisonment for a period of not more than 1 year, Neb. Rev. Stat. § 28-106 (Reissue 1989).

In conformance with the parties' agreement, Judge Hendrix imposed the sentence in each of the cases at a single sentencing hearing. Only the sentence on the assault conviction, No. 13,819, is involved in this appeal; the attempted criminal mischief sentence, No. 13,840, was the subject of a separate appeal and was summarily affirmed. *State v. Foster*, 237 Neb. xxxv (case No. 90-1138, Mar. 22, 1991).

In imposing the sentences, Judge Hendrix observed that given Foster's past record, "close to the maximum sentence is what must be imposed . . . ." Judge Hendrix went on to say:

> [Foster] is sentenced in Case 13,819 to one year with the Department of Corrections . . . .
>
> In Case 13,840, criminal mischief, it is the judgment of the court that [Foster] be and he hereby is sentenced to the Department of Corrections for a period of not less than eighteen months nor more than five years. Said sentence . . . is consecutive to and not concurrent with the sentence in Case 13,819, for assault of an officer.

Judge Hendrix then asked the prosecutor whether he, the judge, had overlooked anything. The prosecutor responded that he believed the sentences had been turned around, pointing out that the assault was a felony and the attempted criminal mischief was a misdemeanor. Judge Hendrix commented that he had been looking at the probation officer's report, which had switched the crime classifications around. He then announced that in the assault case, No. 13,819, the sentence was to be 18 months to 5 years and that in the attempted criminal mischief case, No. 13,840, the sentence was to be 1 year.

The record contains a single journal entry which recites only that the assault sentence is as last mentioned above; the record does not include the trial docket.

The proposition that a "sentence validly imposed takes effect

from the day it is pronounced and a subsequent sentence fixing a different term is a nullity" appears to have first found expression in this court's syllabus in *State v. Brewer*, 190 Neb. 667, 668, 212 N.W.2d 90, 91 (1973). This precise statement is not, however, contained in the *Brewer* opinion.

Therein, the trial court had, during its morning session, imposed a sentence of imprisonment for a period of 20 months to 5 years for possession of a firearm. Later that day, another hearing was held, at which time the State informed the trial court that it intended to prove Brewer was a habitual criminal. The trial court then professed to set aside its earlier sentence and, at a hearing held a week later, found that Brewer was a habitual criminal and thereupon purported to sentence him to imprisonment for a period of 10 to 15 years. On appeal, this court concluded it was obvious that the trial court had meant to impose the sentence it pronounced the first time it considered the matter, and held the second sentence to be a nullity. It noted that the situation did not present a "case where there was some ambiguity in the sentence or inadvertent misstatement in pronouncing it." *Id.* at 676, 212 N.W.2d at 95. The *Brewer* opinion also stated it to be

> the majority rule long followed in this state that when a valid sentence has been put into execution the trial court cannot modify, amend, or revise it in any way, either during or after the term or session of court at which the sentence was imposed. Any attempt to do so is of no effect and the original sentence remains in force.

Id. at 676-77, 212 N.W.2d at 95.

In *State v. Snider*, 197 Neb. 317, 248 N.W.2d 342 (1977), the trial court imposed a sentence of probation for the killing of a steer. When probation was revoked after violation of the probation order, the trial court imposed a prison sentence of 1 to 2 years, with credit given for jail time spent awaiting hearing. While leaving the courtroom after that sentence was imposed, Snider slammed the door behind him. The trial court immediately ordered Snider back into the courtroom and resentenced him to a term of 1 to 2 years without the previously announced credit for jail time. On appeal, Snider argued that the trial court had erred in modifying the sentence first

imposed. This court agreed, stating:

> It is to be noted that the change in this instance was not the clarification of an ambiguity or correction of a prior misstatement in announcing sentence. The rule is that a sentence validly imposed takes effect from the time it is pronounced and that a subsequent sentence fixing a different term is a nullity.

Id. at 319, 248 N.W.2d at 343, citing *State v. Brewer, supra.*

In *State v. Cousins*, 208 Neb. 245, 302 N.W.2d 731 (1981), Cousins had been found guilty of escaping while under arrest for a felony. In passing sentence, the trial court stated that " '[t]his sentence then shall be . . . for a period of one year to eighteen months to be served consecutive to the one I sentenced him on this morning . . . and *concurrently* to' " another sentence. (Emphasis in original.) *Id.* at 246, 302 N.W.2d at 732. Approximately 6 minutes later, the trial court ordered the parties to return to the courtroom, whereupon it stated:

> " 'Let the record show I called the parties back and announced I am not changing any sentence but I am correcting a statement from the Bench. I did not mean this would be concurrent to the sentence imposed by [another judge]. . . . I mean this would be consecutive. I did not want to give this defendant the same amount because of a different history, but it is a second offense. I should have said consecutive to the one imposed by [the other judge].' "

Id. The State argued that as the use of the word "concurrent" was inadvertent, the trial court should be permitted, under the authority of *Brewer* and *Snider*, to amend its sentence. However, this court held that the trial court's attempt to correct its original pronouncement was ineffective. We again noted that a valid sentence takes effect from the time it is pronounced, and declared that

> to begin questioning whether a valid sentence has been pronounced inadvertently would involve this court in a morass. We would be called upon to read the mind of the sentencing judge in any circumstance in which a valid sentence had been pronounced and later amended due to the judge's proclaimed inadvertence. We think that would

> not be the better rule, nor would it be in keeping with the spirit of our previous cases. Therefore, to the extent that *State v. Snider, supra*, might indicate that the mere inadvertence in pronouncing a valid sentence would justify the court in pronouncing another sentence, it is overruled.

Cousins at 247, 302 N.W.2d at 733.

We also considered the matter in *State v. Carlson*, 227 Neb. 503, 418 N.W.2d 561 (1988), a case not cited by either party. The trial court in that case said at 505, 418 N.W.2d at 562: " 'As to the burglary charge, Count II . . . I am going to sentence you to a term of four years maximum—four years minimum, twelve years maximum. Both of these counts are to be served concurrently. Or consecutively. Excuse me, consecutively.' " Relying on *Cousins*, Carlson contended that having once pronounced a sentence, the trial court erred in attempting to both impose a different maximum sentence and change a concurrent sentence into a consecutive one. In reviewing the situation, this court considered significant that the trial court had corrected its "inadvertent statement almost immediately" after it had spoken, concluding that it was clear "under the facts of this case, that the [trial court] did not intend to change a sentence or had not finished pronouncing a sentence." *Carlson* at 505, 418 N.W.2d at 562. This court observed that the situation differed from that in *Cousins*, wherein the defendant had left the courtroom after his sentence had been pronounced and was then returned approximately 6 minutes later at the request of the trial court, which declared it had misspoken the original sentence. The *Carlson* court also noted that the defendant in *State v. Snider*, 197 Neb. 317, 248 N.W.2d 342 (1977), had left the courtroom after the sentence had been pronounced and was returned at the request of the trial court, which then changed the sentence as a result of Snider's actions in leaving the courtroom. The *Carlson* court explained further that it had been unable to find any Nebraska cases "even remotely similar" to the facts of the case then under consideration, *id.* at 505, 418 N.W.2d at 562, saying:

> In the case at issue here, the time which elapsed between the judge's words in sentencing was practically

> nonexistent. The "change" in the sentence is an obvious correction of a misstatement on the part of the judge. It is all part of one sentence, and not a case of imposition of a subsequent sentence. The fact that the judge in this case corrected himself immediately should be indicative of the fact that it was part of the sentence and not the imposition of a subsequent sentence. It is true that *Cousins* does enunciate the rule that a sentence validly imposed takes effect from the time it is pronounced. The question then presents itself as to what constitutes the pronouncement of a sentence, and when does a sentence take effect.

Id. at 506, 418 N.W.2d at 563. Although *State v. Cousins*, 208 Neb. 245, 302 N.W.2d 731 (1981), overruled *State v. Snider, supra*, to the extent it "might indicate that the mere inadvertence in pronouncing a valid sentence would justify the court in pronouncing another sentence," *Cousins* at 247, 302 N.W.2d at 733, the *Carlson* opinion distinguished *Cousins*, *Snider*, and *State v. Brewer*, 190 Neb. 667, 212 N.W.2d 90 (1973), by stating that "where a period of minutes or days elapsed between the pronouncement of sentences, some ambiguity might exist," *Carlson* at 506, 418 N.W.2d at 563, in that an appellate court might find different sentences in separate parts of the bill of exceptions.

The *Carlson* opinion recognized that it would be difficult to set a "hard-and-fast rule" on the question of how much time a court should be given within which to correct itself, saying that each case must depend on its particular facts. It concluded, however, that "under the facts of this particular case it should be clear to any reasonable person that the judge, in correcting his language, did not intend to enhance or increase the sentence in any manner." *Id.* at 506, 418 N.W.2d at 563.

The concern in *Cousins*, that "to begin questioning whether a valid sentence has been pronounced inadvertently would involve this court in a morass," was real under those facts. The trial court had adjourned, Cousins had left the courtroom, and time had elapsed before the trial court proclaimed it had inadvertently spoken an otherwise valid sentence. In such an instance, any reason advanced in support of a claim that the otherwise valid sentence was not the sentence intended would

be open to question. Under the facts in *Carlson*, however, this concern could not arise, for the correction was made while Carlson was still in the courtroom, while court was still in original session, and before anyone had an opportunity to make any ex parte statement to the trial court.

Regardless of the time factor, it is obvious that after the error was called to his attention in this case, Judge Hendrix immediately corrected what the erroneous presentence report had led him into saying by pronouncing the sentences he had always intended to impose. This is in part evidenced by his statement at the beginning of the sentencing that close to the maximum sentence must be imposed. Although it is true Judge Hendrix did not notice his mispronouncement until the prosecutor called it to his attention, the prosecutor's comments did nothing more than point out the inapplicability of the pronounced sentences to one of the crimes involved, a matter which should have been apparent to all—the sentence mistakenly imposed for the attempted criminal mischief conviction exceeded the maximum allowed by statute, and was thus erroneous. Under these facts, the *Cousins* concern of having to read a trial court's mind does not exist. The facts make it clear that Judge Hendrix misspoke and did not intend in this case the sentence he first pronounced.

It must also be remembered that to create finality in a criminal case, it is necessary that there be a judgment of conviction, followed by a sentence. See *State v. Kramer*, 231 Neb. 437, 436 N.W.2d 524 (1989), citing *In re Interest of Wolkow*, 206 Neb. 512, 293 N.W.2d 851 (1980). Thus, for the purpose of appeal in a criminal case, it is the sentence which is the judgment. *State v. Spotted Elk*, 227 Neb. 869, 420 N.W.2d 707 (1988). A judgment is rendered when it is both pronounced and some written notation of it is made and filed in the records of the court. See, *State v. Temple*, 230 Neb. 624, 432 N.W.2d 818 (1988); *Hoffman v. Reinke Mfg. Co.*, 227 Neb. 66, 416 N.W.2d 216 (1987); *Federal Land Bank v. McElhose*, 222 Neb. 448, 384 N.W.2d 295 (1986); Neb. Rev. Stat. § 25-1301 (Reissue 1989). Foster has failed to establish that the sentence first pronounced by Judge Hendrix in this case was ever "rendered," for there is no showing that any written notation of it was made

in the records of the court.

That a sentence validly imposed takes effect from the time it is pronounced and a subsequent sentence fixing a different term is a nullity does not mean that a judge may never correct an inadvertent mispronouncement of a sentence. The circumstances under which a judge may correct an inadvertent mispronouncement of a sentence are limited to those instances in which it is clear that the defendant has not yet left the courtroom, it is obvious that the judge, in correcting his or her language, did not change in any manner the sentence originally intended, and no written notation of the inadvertently mispronounced sentence was made in the records of the court.

AFFIRMED.

GERRY HILDEBRAND, APPELLANT, V. LARRY HILDEBRAND, APPELLEE.

477 N.W.2d 1

Filed November 22, 1991. No. 91-163.

1. **Divorce: Marriage: Child Custody: Child Support.** If the parties to a divorce decree remarry each other, they no longer have separate rights of custody and separate obligations for future support; rather, the same joint rights to custody and joint obligations for future support which antedated the divorce are resumed.
2. **Child Custody.** Under the provisions of Neb. Rev. Stat. § 42-364(3) (Reissue 1988), two requirements must be satisfied before a court may grant joint custody of a child: (1) The parents must agree to the arrangement, and (2) a hearing must be held to determine that such serves the best interests of the child.
3. _____. Joint custody of a child is not favored and must be reserved for only the rarest of cases.
4. **Divorce: Alimony: Property Division.** Although alimony and distribution of property have different purposes in marriage dissolution proceedings, they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together.
5. **Divorce: Property Division.** The ultimate test in determining the appropriateness of the division of property is reasonableness as determined by the facts in each case.
6. **Divorce: Alimony: Pensions.** Awarding alimony in a specified amount to one spouse for her or his lifetime is an appropriate method of dealing with the other

spouse's pension funds.

7. **Divorce: Property Division: Pensions.** A trial court may exercise discretion in valuing pension rights and in dividing such rights between the parties.
8. **Divorce: Alimony.** One of the elements to be considered in the allowance of alimony is the earning capacity of the other spouse.
9. **Divorce: Property Division.** In dividing marital property, the trial court should take into consideration the indebtedness of the parties in order to divide the net marital estate.

Appeal from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed as modified.

Van A. Schroeder, of Bertolini, Schroeder & Blount, for appellant.

Richard W. Harter, of Harter Law Office, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

I. INTRODUCTION

The petitioner-appellant former wife, Gerry Hildebrand, instituted this action in an effort to obtain a legal separation from the respondent-appellee former husband, Larry Hildebrand. He in turn successfully cross-petitioned for dissolution of the marriage. In this court the wife asserts, in summary, that in granting the husband's prayer, the district court erred in its (1) child custody and related support determinations and (2) property divisions and alimony award. We affirm as modified.

II. FACTS

The parties married each other twice, the first time on July 31, 1966. That marriage lasted 13 years 10 months, having been dissolved by an Alaska decree in June 1980. The parties then remarried on October 4, 1984. That marriage lasted 6 years 3 months, being terminated by the decree in question on January 10, 1991. While the second marriage produced no children, the first union brought forth two daughters: Patricia Anna, born on January 17, 1970, and Grace Elaine, born on May 23, 1972. An automobile accident rendered the older daughter a quadriplegic in September 1987, and the wife serves as her

guardian. This daughter lives in a house which the parties acquired through a special government assistance program, but which they did not themselves occupy and which is not involved in the issues presented. Neither is this daughter's care at issue, except for the payment of the bills discussed in part III(2)(c) below.

Notwithstanding that each of the parties sought sole custody of the younger daughter, who was then a little less than a half year away from adulthood, the district court granted them joint custody. The district court specifically noted that with respect to the younger daughter's support, the "[o]rder of the Alaska court . . . remains in effect." While the record does not contain a copy of the Alaska decree, the district court, in the course of entering a temporary order on December 21, 1989, wrote that the husband remained obligated to pay "the sum of $200.00 per month" in support for the younger daughter under the terms of that decree. This statement apparently refers to the sum the husband, in satisfaction of the Alaska decree, had caused to be automatically deducted from his paycheck and deposited in an account owned by the wife.

The husband served in the U.S. Air Force throughout the 20 years the parties were married, and the wife accompanied him as required. The evidence suggests that the couple has lived in Germany, Alaska, Montana, and Nebraska. When the parties' older daughter was injured in 1987, the wife quit her employment and stayed home with the girl until February 1989. During this time, the wife withdrew the entire amount of her civil service retirement, approximately $5,000, to pay family expenses. The husband is a weather forecaster, but for the 4 years prior to retirement has worked in manpower management. He has an associate degree and has enrolled in a university course in order to earn a bachelor's degree in geography.

The husband was scheduled to retire from the U.S. Air Force on February 1, 1991, after 27 years of service, at which time he would receive a gross retirement pay of $1,711 per month. The wife specifically sought an interest in his retirement pension. However, the district court refused to grant the wife a property interest in the pension but, rather, awarded her alimony of $500

per month for 6 months, then $200 per month for her lifetime, regardless of whether she marries. In so ruling, the district court concluded that the husband's pension plan through the first years of military service was not a proper marital asset for distribution. Instead, the district court estimated that for the current 6 years of marriage, the wife's share of the pension had a value of slightly less than $200 a month.

The subject decree also awarded the parties' residence to the wife, subject to a mortgage requiring a $635.39 payment per month and a home improvement mortgage loan requiring a payment of approximately $100 per month, and holds the husband "harmless from liability for those debts."

The wife also received an interest worth approximately $3,700 in a retirement account and various other items of personal property, including life insurance policies and two automobiles, in one of which the younger daughter had an ownership interest. The wife was ordered to pay approximately $1,600 in debts she incurred and, in addition, was obligated to pay $162 per month on a loan covering an automobile she was awarded.

The husband was awarded an interest having a value of approximately $4,300 in the aforementioned retirement account, a checking account with a balance of $1,894, and various other items of personal property, including a pickup truck, a boat motor, and a trailer. He was ordered to pay approximately $13,800 in debts.

At the time of trial, the husband had a net monthly income of $2,636.57 from the Air Force and approximately $400 a month as an automobile salesman. The wife, a civil service secretary at Offutt Air Force Base, was earning $476.21 every 2 weeks.

III. ANALYSIS

With the foregoing factual background in mind, we turn our attention to an analysis of the issues presented by the wife's two summarized assignments of error.

1. Child Custody and Support

The first summarized assignment of error urges that the district court erred in granting joint custody of the younger daughter, arguing that sole custody should have been granted to

the wife, with appropriate child support.

We begin our review of this summarized assignment by noting that the district court erroneously concluded that the Alaska decree was effective and binding in regard to child support. We agree with the statement in *Schaff v. Schaff*, 446 N.W.2d 28, 31 (N.D. 1989), that "if the parties to a divorce decree remarry each other, they no longer have separate rights of custody and separate obligations for future support; rather, the same joint rights to custody and joint obligations for future support which antedated the divorce are resumed." See, also, *Davis v. Davis*, 68 Cal. 2d 290, 437 P.2d 502, 66 Cal. Rptr. 14 (1968); *In re Marriage of Root*, 774 S.W.2d 521 (Mo. App. 1989); *Oliphant v. Oliphant*, 177 Ark. 613, 7 S.W.2d 783 (1928); *Cain v. Garner*, 169 Ky. 633, 185 S.W. 122 (1916); *Lockard v. Lockard*, 49 Ohio Op. 163, 102 N.E.2d 747 (1951); *Jenkins v. Followell*, 262 P.2d 880 (Okla. 1953); *Slape v. Slape*, 553 S.W.2d 171 (Tex. Civ. App. 1977); *Warren v. Warren*, 213 Ga. 81, 97 S.E.2d 349 (1957). In *In re Marriage of Root, supra*, the court wrote at 774 S.W.2d at 523:

> It would be absurd to hold that once parents remarry each other and the family is again intact and residing in the same household, the former noncustodial parent must pay future installments of child support to the other parent per the past divorce decree. That is to say, the remarriage should terminate the former noncustodial parent's duty to pay any child support *that would have become due after the remarriage*.

(Emphasis in original.)

Indeed, *Scheibel v. Scheibel*, 204 Neb. 653, 284 N.W.2d 572 (1979), implies that child support obligations terminate upon remarriage of the parties. The parties therein were divorced and the decree required the father to pay $25 per month in child support. Six years later, the parties remarried and again divorced, at which time the mother brought suit against the father to collect arrearages for child support claimed to have occurred between the first divorce and the second marriage. This court affirmed the mother's right to collect the delinquent amount, thereby leading to the inference that once parties remarry, the former child support order is moot, while any

deficiencies prior to the marriage are collectible. See Annot., 26 A.L.R.4th 325 (1983).

When the parties to this action remarried in 1984, all future child support obligations under the Alaska decree were terminated. The fact that $200 continued to be automatically withdrawn from the husband's paycheck and placed into a private account for the wife cannot be interpreted as a continuation of the child support. At the moment of their remarriage, the $200 transfer became simply that, a transfer. It was no longer in satisfaction of any legal or court-enforced obligation.

That having been developed, we turn our attention to what should have been done.

(a) Custody

Neb. Rev. Stat. § 42-364(3) (Reissue 1988) provides:

> The court may place the custody of a child with both parents on a shared or joint-custody basis when both parents agree to such an arrangement. In that event, the parents shall have equal rights to make decisions in the best interests of the child in their custody. The court shall not place a child in joint custody without conducting a hearing in open court and specifically finding that joint custody is in the best interest of the child regardless of any parental agreement or consent.

Thus, two requirements must be satisfied before a court may grant joint custody of a child: (1) The parents must agree to the arrangement, and (2) a hearing must be held to determine that such serves the best interests of the child. In addition, this court has frequently and consistently expressed disapproval of joint custody as a purported solution for the difficulty confronted by a court in determining a question concerning child custody, *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988), explicitly stating that joint custody is not favored and must be reserved for only the rarest of cases, *Wilson v. Wilson*, 224 Neb. 589, 399 N.W.2d 802 (1987).

In the instant action, neither the wife nor the husband requested joint custody; rather, each sought sole custody of the younger daughter. Additionally, no determination appears to

have been made concerning what custody arrangement would best serve the child's interests. While the district court made several references to the fact that the younger daughter was living alone in an apartment, it appears to have relied solely on the fact that she would be emancipated in 6 months. Whether the custody arrangement was to last 6 days or 6 years, § 42-364(3) was violated; however, at this point, the daughter is an emancipated adult, and, consequently, the issue of her custody is moot, except as it is necessary to determine which parent should have been given custody during the 6 months of the daughter's minority and whether child support should have been paid during that period and, if so, in what amount.

The younger daughter lived in the family home with the wife from the time the latter filed her petition on October 12, 1989, until October 1990, when the daughter moved into an apartment. In connection with that move, the wife testified that the daughter had a drinking problem, wanted to be on her own outside the presence of adults, and voluntarily moved out of the family home. Irrespective of the daughter's desire to be on her own, she continued to be supported by her parents and thus did not become emancipated. See *Accent Service Co., Inc. v. Ebsen*, 209 Neb. 94, 306 N.W.2d 575 (1981).

Under the circumstances, the younger daughter's custody, during the remaining period of her minority, should have remained with the wife. That leaves the matter of child support.

(b) Support

The daughter lived on her own as a minor for approximately 8 months, from October 1990 until May 1991, when she reached majority. From the entry of the temporary order to the first day of trial, November 26, 1990, the husband had paid $400 per month in support for the younger daughter, $200 under the arrangement carried over from the Alaska decree and $200 as the result of the district court's temporary order, and, in addition, had paid for the daughter's apartment. The wife testified that since the daughter moved out in October 1990, she has given her $300 a month and retained the rest of the support money for reimbursement for tires she bought for the daughter.

The Nebraska Child Support Guidelines (rev. 1991) compute

the presumptive share of each party's child support obligation on the basis of the "total monthly income," which is defined as the "income of both parties derived from all [moneys]" except for that derived from certain designated sources not involved in this case, less, so far as relevant to our inquiry, tax and Social Security insurance payments. *Peterson v. Peterson, ante* p. 113, 474 N.W.2d 862 (1991). The husband's monthly income to February 1, 1991, was $3,036.57 ($2,636.57 from the Air Force and $400 as a part-time automobile salesman). The wife had a 4-week income of $952.42, or approximately $1,030 per month. Thus, the total monthly income was $4,066.57, 75 percent of which was attributable to the husband and 25 percent to the wife.

According to the income shares formula of the guidelines, a total monthly income of $4,066.57 entitles an only child to $655.66 in support. Thus, the husband's share of the child support is equal to 75 percent multiplied by $655.66, or $491.74 a month; the wife's share is 25 percent multiplied by $655.66, or $163.92. Consequently, the husband initially owes the wife $333.11 for the 21 days in January remaining from the date of the decree, January 10, 1991.

From February until May, the husband had a gross military pension of $1,711 and earned approximately $400 a month as an automobile salesman, for a gross monthly income of $2,111. Giving him credit for $600 in tax and Social Security insurance payments, he had a monthly income of $1,511. The wife's monthly income remained at $1,030, producing a total monthly income of $2,541 for the parties. According to the guidelines, such a total monthly income entitles an only child to $466.74 per month in support. Since the husband's income represents 59 percent of the parties' total monthly income, he is responsible for $275.38 and the wife for the remaining 41 percent, or $191.36. Consequently, for the period from February 1, 1991, through May 22, 1991, the husband's initial share of child support is $1,021.57 (for the months of February through April, plus 22 days in May). The husband's total child support obligation from January 10 through May 22, 1991, is therefore $1,354.68, minus any child support contributions he has made subsequent to the entry of the subject decree.

2. PROPERTY DIVISIONS AND ALIMONY AWARD

In connection with the second summarized assignment of error, the wife makes four complaints: that she was not granted a sufficient interest in the husband's pension, that she was given insufficient alimony to cover the house mortgages, that the district court failed to account for a credit card debt, and that the district court ordered her to deliver to the husband a gun she no longer possessed.

We begin this aspect of our analysis by recalling that Neb. Rev. Stat. § 42-365 (Reissue 1988) states in part:

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

Although alimony and distribution of property have different purposes in marriage dissolution proceedings, "they are still closely related in the matter of determining the amount to be allowed, and circumstances may require that they be considered together . . . ." *Kullbom v. Kullbom*, 209 Neb. 145, 149, 306 N.W.2d 844, 846 (1981). Moreover, the ultimate test in determining the appropriateness of the division of property is reasonableness as determined by the facts in each case. *Hallan v. Hallan*, 233 Neb. 261, 444 N.W.2d 896 (1989).

(a) Pension

The wife first avers that she has a right to a share of the husband's pension reflecting 20 years of marriage.

In considering this issue, it must be borne in mind that when the parties were divorced in 1980, Alaska did not recognize military pensions as marital property subject to division upon divorce. See *Cose v. Cose*, 592 P.2d 1230 (Alaska 1979). Thus, upon the entry of the Alaska decree, the portion of the pension

earned during the first marriage became the husband's separate property. See *Froelich v. Froelich*, 236 Neb. 808, 464 N.W.2d 310 (1991) (judgment rendered by sister state which has jurisdiction is to be given full faith and credit in Nebraska). The district court therefore correctly determined that the portion of the pension earned during the first marriage was not a marital asset and that the only part of the pension subject to distribution was the portion earned during the second marriage.

In that regard, Neb. Rev. Stat. § 42-366(8) (Reissue 1988) provides, in relevant part: "The court shall include as part of the marital estate, for purposes of the division of property at the time of dissolution, any pension plans, retirement plans, annuities, and other deferred compensation benefits owned by either party, whether vested or not vested." While it has been said that this court has not favored lifetime awards of alimony, *Albers v. Albers*, 213 Neb. 471, 329 N.W.2d 567 (1983), in *Taylor v. Taylor*, 217 Neb. 409, 348 N.W.2d 887 (1984), we held that the awarding of alimony in a specified amount to one spouse for her or his lifetime is an appropriate method of dealing with the other spouse's pension funds. We have also declared that a trial court may exercise "discretion in valuing pension rights and in dividing such rights between the parties." *Rockwood v. Rockwood*, 219 Neb. 21, 23, 360 N.W.2d 497, 499 (1985).

In *Carruth v. Carruth*, 212 Neb. 124, 321 N.W.2d 912 (1982), we stated that one of the elements to be considered in the allowance of alimony is the earning capacity of the other spouse. Not only is the husband's earning capacity in this case presently greater than that of the wife, it has the potential to increase even more as a result of his educational pursuit. On the other hand, the wife's earning capacity is unlikely to improve. It is also obvious that she has fixed expenses of approximately $900 per month in automobile and house mortgage loans over and above the costs of retiring the debts the decree obligated her to pay and the costs of clothing, feeding, and maintaining herself. Under the circumstances, we conclude that the alimony awarded is inadequate. Although the $500 per month awarded for the first 6 months should not be modified, the $200 per

month awarded thereafter for the rest of her life is to be increased to $400 per month.

(b) Mortgages

The wife next complains that the district court failed to provide her with sufficient funds with which to pay the mortgage loans against the house she was awarded.

In *Reuter v. Reuter*, 218 Neb. 732, 359 N.W.2d 78 (1984), the ex-wife had been given $200 a month in child support, $200 a month in alimony for 60 months, and the house, owned by her parents, which had improvement debts of $50,750. At the time of trial, the ex-wife was unemployed. The ex-husband earned $1,550 per month at his full-time job and $5,000 per year farming. The ex-wife challenged the district court decision, arguing that she should not be required to pay all of the joint debt and that the alimony award was inadequate, given the $600-a-month payments on the debt. This court, however, found that obligating the ex-wife for the full debt was not an abuse of discretion.

Neither can it be said that the district court abused its discretion in this case.

(c) Additional Debt

The wife also complains that the district court failed to consider and allocate the debt incurred on a particular VISA credit card account held in her name. There is no question that in dividing marital property, the trial court should take into consideration the indebtedness of the parties in order to divide the net marital estate. See *Keim v. Keim*, 228 Neb. 684, 424 N.W.2d 112 (1988). See, also, *Black v. Black*, 221 Neb. 533, 536, 378 N.W.2d 849, 851 (1985) ("[w]e have consistently spoken of dividing the *net* marital estate" (emphasis in original)).

The wife testified that she possessed her own VISA credit card account, which had approximately $1,500 to $1,600 in debt. She also testified that this debt was incurred for "our boat [and] some . . . for our handicapped child." Consequently, the wife has asked the husband to share responsibility in paying off her VISA debt by contributing $500.

The husband's VISA credit card account was paid off prior

to separation out of the joint account of the parties, but he, personally, had incurred an additional $1,200 in debt thereon.

The subject decree simply requires the husband to pay off VISA. Although it is unclear to which VISA account the district court makes reference, it appears that the court was obligating the husband to pay off his own account. Concluding that the wife's VISA account was not addressed and since the evidence is uncontroverted that part of the $1,500 to $1,600 debt was incurred for family expenses, we determine it was error for the district court to ignore disposition of the debt incurred on the wife's VISA account; accordingly, the husband is to pay $500 toward the retirement of this debt.

(d) Gun

Finally, the wife asserts the district court erred in requiring her to deliver to the husband a certain Ruger .243-caliber rifle, claiming that as she is no longer in possession of it, the gun cannot be considered marital property subject to distribution.

The husband testified that when the couple were in Montana, the gun "was bought for [the wife] to use and if you want to call it a gift then, yes, it was." However, the Alaska divorce decree awarded the gun to the husband, and it thus became his separate property which he brought to the second marriage. See *Simmonds v. Fenton*, 95 Neb. 771, 146 N.W. 944 (1914) (interest awarded wife pursuant to divorce decree becomes wife's property and is not subject to attachment in action against husband). See, also, *Henderson v. Henderson*, 764 P.2d 156 (Okla. 1988) (property distributed from previous marriage remains personal upon couple's subsequent marriage together). Subsequent to the husband's moving out of the house, the wife pawned the gun for $220 to her oldest brother, saying that she had "someone holding it for $220 that they loaned me."

The district court did not abuse its discretion in awarding the gun to the husband. The American Heritage Dictionary of the English Language 963 (1969) defines pawn as "[s]omething given as security for a loan." Further, the common understanding of pawning property connotes an intent to retrieve it at some later date. The wife's own words suggest that

the transaction was temporary and that she pawned the gun to her brother. She need only repay him the $220 he loaned her to retrieve the gun she pledged as security for the loan.

IV. ORDER

For the foregoing reasons, we direct that the decree of the district court be modified as set forth in this opinion, and as so modified, the decree is affirmed.

AFFIRMED AS MODIFIED.

JUDEE E. MOSER, APPELLANT, V. RANDALL S. MOSER, APPELLEE.
476 N.W.2d 922

Filed November 22, 1991. No. 91-187.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

James H. Hoppe, of Watkins-Scott-Hoppe, for appellant.

Gregory D. Barton, of Harding & Ogborn, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Judee E. Moser appeals the judgment of the district court which awarded sole custody of the parties' minor child to the child's father, Randall S. Moser, with specific visitation rights to Judee Moser as mother of the child.

> In an appeal involving an action for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed

> the witnesses and accepted one version of the facts rather than another.

Huffman v. Huffman, 236 Neb. 101, 104, 459 N.W.2d 215, 219 (1990). Accord, *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991); *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990). "Child custody in a proceeding to dissolve a marriage is a matter within the trial court's discretion." *Ritter v. Ritter, supra* at 208, 450 N.W.2d at 209. Accord *Peterson v. Peterson*, 224 Neb. 557, 399 N.W.2d 792 (1987).

From our de novo examination and review of the record, we have determined that the district court did not abuse its discretion. See *Huffman v. Huffman, supra*.

AFFIRMED.

RODNEY PHELPS, APPELLANT, V. JOYCE PHELPS, APPELLEE.

477 N.W.2d 552

Filed December 6, 1991. No. 89-413.

1. **Child Support: Modification of Decree: Appeal and Error.** Modification of child support is an issue entrusted to the discretion of the trial court. Appellate review of such issues is de novo on the record, but absent an abuse of discretion by the trial court, its decision will be affirmed on appeal. The de novo review is also qualified by the fact that where there is a conflict in the evidence, weight is given to the fact that the trial court saw and heard the witnesses and accepted one version of the facts as opposed to the other.
2. **Child Support: Modification of Decree: Proof.** The party seeking to modify a child support order must show a material change in circumstances which occurred subsequent to the entry of the original decree and was not contemplated when the decree was first entered.
3. **Child Support: Modification of Decree: Rules of the Supreme Court.** The adoption of the Nebraska Child Support Guidelines effective October 1, 1987, constituted a material change of circumstances sufficient to justify consideration of proposed modification of child support orders entered before that date.
4. **Child Support: Rules of the Supreme Court.** In general, child support payments should be set according to the Nebraska Child Support Guidelines, which compute the presumptive share of each parent's child support obligation.
5. _____: _____. The court may deviate from the Nebraska Child Support Guidelines whenever the application of the guidelines in an individual case

would be unjust or inappropriate.

6. **Child Support.** The primary interest in determining the level of child support payments is the best interests of the children.
7. **Appeal and Error: Words and Phrases.** Plain error is error which was unasserted or uncomplained of at trial or on appeal, but is plainly evident from the record, which prejudicially affects a litigant's substantial right and which is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.
8. **Child Support: Appeal and Error.** Under certain circumstances, an order that a part of child support payments be held in escrow while an appeal to the Supreme Court is pending is an abuse of discretion.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed in part, and in part reversed.

Paul M. Conley for appellant.

James A. Cada, of Bailey, Polsky, Cada, Cope & Wood, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

This is an action to modify a dissolution decree which was entered in 1977. On October 6, 1988, the appellee, Joyce Phelps, filed a petition to modify the decree to increase child support for the parties' minor child, born August 16, 1975. On March 2, 1989, the district court entered an order raising the appellant's child support obligation from $125 per month to $400 per month. Appellant's motion for new trial was overruled on March 31.

The appellant filed his notice of appeal on May 1, 1989. On the same day, he filed a motion in the district court asking the court to place the increased child support in escrow. In June 1989, pursuant to Neb. Rev. Stat. § 42-351(2) (Reissue 1988), the district court entered orders that a portion of the appellant's monthly child support payments be placed in escrow.

The appellant contends in this court that the district court erred in increasing his child support obligation to $400 per month. Modification of child support is an issue entrusted to the discretion of the trial court. Appellate review of such issues is de novo on the record, but absent an abuse of discretion by

the trial court, its decision will be affirmed on appeal. The de novo review is also qualified by the fact that where there is a conflict in the evidence, weight is given to the fact that the trial court saw and heard the witnesses and accepted one version of the facts as opposed to the other. *Dobbins v. Dobbins*, 226 Neb. 465, 411 N.W.2d 644 (1987).

The record shows that when the parties' marriage was dissolved in 1977, the appellant earned approximately $11,000 per year working as a firefighter for the city of Lincoln. He has remained in that position and now earns $28,000 per year, plus insurance and pension benefits, from that job. The appellant also receives approximately $200 per month net income from rental property. He and his present wife have also owned and operated an antique store in Lincoln for the past 8 years. The appellant testified that neither of them draws a salary from their antique business, but that they have reinvested their profits in the business. He testified that he did not know what his equity in the antique business was, that he did not know what his income from the antique business was, that he did not declare any income on his income tax returns from the antique business, and that he put between $10,000 and $20,000 back into the antique business in 1988.

The appellee worked as a receptionist after the 1977 decree, earning approximately $3 per hour, with several periods of unemployment. In May 1986, she had an accident and cut the tendons in her right hand. The wound became infected after surgery and the appellee was eventually diagnosed as having "RS dystrophy," which was described as the constricting of blood vessels and arteries in an injured limb. She also suffered a collapsed lung and pneumonia as a result of her treatment for RS dystrophy. As of the hearing date, the appellee was unemployed and her doctor had not released her for job training efforts.

We have held that a party seeking to modify a child support order must show a material change in circumstances which occurred subsequent to the entry of the original decree and was not contemplated when the decree was first entered. See *Schmitt v. Schmitt*, *post* p. 632, 477 N.W.2d 563 (1991). In this case, the appellant contends the district court erred in

concluding that "a raise of almost 150% was a material and substantial change in circumstance," brief for appellant at 12-13, and that "[i]n a modification of decree proceeding, an increase in child support award based solely upon the current income formula applied to the Nebraska Child Support Guidelines is an abuse of discretion," brief for appellant at 16. Our opinion in *Schmitt* disposes of these issues.

In *Schmitt v. Schmitt, supra*, the parties' marriage was dissolved in August 1987 and the husband was ordered to pay $100 per month per child for the first 36 months and $150 per month per child thereafter for the support of three minor children. The Nebraska Child Support Guidelines became operative on October 1, 1987, and the wife sought modification of the child support order due to a material change in circumstances, contending that the guidelines suggested a total child support obligation of approximately $880 per month. We noted in *Schmitt, supra* at 637, 477 N.W.2d at 566, that the implementation of certain federal and state statutes "may well render the concept of 'material change of circumstances' of much less concern," and held that the adoption of the Nebraska Child Support Guidelines effective October 1, 1987, constituted a material change of circumstances sufficient to justify consideration of proposed modification of child support orders entered before that date.

In general, child support payments should be set according to the Nebraska Child Support Guidelines, which compute the presumptive share of each parent's child support obligation. *Peterson v. Peterson, ante* p. 113, 474 N.W.2d 862 (1991); *Knippelmier v. Knippelmier*, 238 Neb. 428, 470 N.W.2d 798 (1991). See Neb. Rev. Stat. § 42-364.16 (Reissue 1988). The court may deviate from the guidelines whenever the application of the guidelines in an individual case would be unjust or inappropriate. *Knippelmier v. Knippelmier, supra*. The primary interest in determining the level of child support payments is the best interests of the children. *Schmitt v. Schmitt, supra*; *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991).

Despite the suggestion of the appellant that his child support obligation should not be increased because the appellee is now

married to a man who makes approximately $25,000 per year and because she "blew" a $3,000 settlement she received in an interim divorce, which is irrelevant, the appellant has offered no evidence tending to rebut the presumption that the child support guidelines should be applied in this case.

In our application of the guidelines, the record shows that the appellant has monthly net income of $2,208.46, even excluding the income generated by the antique business. In contrast, the appellee is disabled, has no income of her own, and has essentially no earning capacity. See *Knippelmier v. Knippelmier, supra*. Under the circumstances, the district court did not err in ordering the appellant to pay $400 per month child support, as calculated under the child support guidelines.

Finally, we consider whether it was plain error for the district court to enter the escrow orders referred to above. We have defined plain error as

> " 'error which was unasserted or uncomplained of at trial or on appeal, but is plainly evident from the record, which prejudicially affects a litigant's substantial right and which is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.' "

State on behalf of Garcia v. Garcia, 238 Neb. 455, 458, 471 N.W.2d 388, 390 (1991).

In this regard, the record shows that on May 1, 1989, the same day he filed his notice of appeal, the appellant filed a motion in the district court asking the court "to enter an Order directing the Clerk of the District Court to accept the increased child support but to place the money in escrow and not pay it to [appellee] during the pendency of Petitioner's appeal to the Nebraska Supreme Court." On June 2, 1989, the district court made the following ruling on the appellant's motion to escrow the increased child support:

> Pursuant to . . . § 42-351(2), pending appeal, Court's child support order of $450/month [sic] remains in effect; however, only $325 thereof is to be disbursed to [appellee] and the remaining $125 [sic], is to be held in an interest bearing account by the Clerk pending resolution of the appeal.

On the court's own motion, and following separate conversations with counsel for both parties, the court vacated and set aside its order of June 2, 1989, and entered the following order on June 7:

> Pursuant to . . . § 42-351(2), pending resolution of the plaintiff's appeal, the Court's child support order of $400 dated 3-2-89 is modified effective 5-31-89 so that the Plaintiff owes to the minor child the sum of $75/month, said sum to be paid through the Clerk of the District Court and to be held by the Clerk in an interest bearing account pending determination of the plaintiff's appeal.

Section 42-351(2) provides:

> When final orders relating to proceedings governed by sections 42-347 to 42-379 are on appeal to the Supreme Court and such appeal is pending, the district court that issued such orders shall retain jurisdiction to provide for such orders regarding custody, visitation, or support *or other appropriate orders in aid of the appeal process*.

(Emphasis supplied.)

Neither party has assigned any errors relating to the escrow orders; however, both parties sought guidance on the matter during oral arguments.

In this case, the appellant could have asked for an escrow arrangement at the time the modification order was entered. We believe the case does not present the type of situation contemplated by § 42-351(2). Although the district court retains jurisdiction to enter orders pertaining to custody, visitation, and support while an appeal is pending, the statute was meant to protect the interests of dependent children, not the parents' financial interests. In this case the order that a part of the child support payments be held in escrow while the appeal was pending was an abuse of discretion.

The district court's order increasing the appellant's child support obligation to $400 per month is affirmed. The clerk of district court is ordered to remit all payments held in escrow to the appellee.

AFFIRMED IN PART, AND IN PART REVERSED.

LARRY R. KAISER ET AL., APPELLANTS, ROBERT ISENBERG ET AL., APPELLEES, V. WESTERN R/C FLYERS, INC., ET AL., APPELLEES.
477 N.W.2d 557

Filed December 6, 1991. No. 89-486.

1. **Equity: Appeal and Error.** In the appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
2. **Expert Witnesses: Rules of Evidence.** Expert testimony is relevant and admissible only if it tends to help the trier of fact understand the evidence or to determine a fact issue.
3. _____: _____. Generally, expert testimony concerning a question of law is not admissible in evidence.
4. **Property: Nuisances.** Mere ownership of real property imposes no responsibility for a nuisance on it unless the owner is instrumental in causing the nuisance.
5. **Zoning: Words and Phrases.** The term "commercial," as used in the law of zoning, denotes a use for profit.
6. **Nuisances.** Whether noise is sufficient to constitute a nuisance depends upon its effect upon an ordinary, reasonable man, that is, a normal person of ordinary habits and sensibilities.
7. **Nuisances: Presumptions.** To justify abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. It is presumed, in the absence of evidence to the contrary, that a plaintiff has ordinary sensibilities.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed.

James T. Gleason, of Stalnaker, Becker, Buresh, Gleason & Farnham, P.C., for appellants.

Norman F. Bradshaw for appellee Western R/C Flyers.

Deborah D. McLarney, of Erickson & Sederstrom, P.C., for appellees Startzer.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

In this action, the plaintiffs Larry R. and Katherine Kaiser, Margaret Schraeder, and Anthony and Helen Stepanek sought to permanently enjoin the defendants, Western R/C Flyers,

Inc., and Jay and Elaine Startzer, from operating a model airplane airfield near the village of Springfield, Sarpy County, Nebraska. In their amended petition, the plaintiffs alleged that the noise generated by the flying of the model airplanes violated Springfield zoning ordinances, was a nuisance, violated their statutory right to privacy, and constituted a continuing trespass. The district court found that the plaintiffs failed to meet their burden of proof regarding the alleged violation of zoning ordinances, that the defendants' activities did not constitute a nuisance, that the statutes relating to the right of privacy did not apply to the facts as alleged, that Western R/C Flyers was guilty of an unintentional continuing trespass which should be enjoined based upon the payment of fines for any future trespasses, and that each party should pay its own costs.

The plaintiffs, except Robert and Donna Isenberg, have appealed, contending the district court erred (1) in finding that they failed to meet their burden of proving the defendants were using the real estate in violation of applicable zoning ordinances, (2) in finding that using the premises for operation of model airplanes did not constitute a nuisance, (3) in finding that the use of the premises by the defendants did not violate plaintiffs' statutory right to privacy, (4) in failing to enjoin the defendants from using the premises for a radio-controlled scale model airplane airfield, and (5) in taxing costs to the plaintiffs.

An action for an injunction sounds in equity. In the appeal of an equity action, the Supreme Court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, however, that where the credible evidence is in conflict on a material issue of fact, the court considers and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *State ex rel. Spire v. Strawberries, Inc., ante* p. 1, 473 N.W.2d 428 (1991); *Burgess v. Omahawks Radio Control Org.*, 219 Neb. 100, 362 N.W.2d 27 (1985).

The record shows that defendants Startzers own approximately 160 acres of land located within the zoning jurisdiction of the village of Springfield. The plaintiffs own property adjacent to the Startzer property. On January 2, 1973,

the Startzer property was zoned "A Agricultural Residential District," pursuant to a Springfield village ordinance. When the ordinance was passed, the Startzers used the land primarily to raise row crops. An airstrip has also existed on the Startzer property for 20 to 25 years. The airstrip was used infrequently and ceased being used for full size aircraft for approximately 2 years during the mid-1970's.

Defendant Western R/C Flyers is a domestic nonprofit corporation organized to promote the recreational flying of radio-controlled model airplanes. On November 13, 1980, the club leased 1 acre of the Startzer property as an airfield and club site for flying radio-controlled model airplanes. They built a shed on the property in 1983. The club has maintained a leasehold interest in the Startzer property and now pays $500 per year in rent. Startzers have also given the club permission to fly planes within the boundaries of the entire Startzer property. The flight area is an oval shape approximately 600 feet long and 100 to 120 feet wide. The planes that are flown are replicas of real aircraft, powered by small gas engines and a gasoline-type fuel.

The planes occasionally fly beyond the border of the Startzer property and over the plaintiffs' property. Plaintiff Anthony Stepanek produced the remains of 4 model airplanes which crashed on his property between 1982 and 1988 and testified he was aware of approximately 12 more airplanes that had crashed on his property. Larry Kaiser testified that he observed one plane overfly his property and saw a plane crash across the road from Margaret Schraeder's house in 1987, on property not owned by any party to this lawsuit.

The plaintiffs first contend that the operation of radio-controlled model airplanes on the Startzer property violates the Springfield zoning ordinances. Under these ordinances, the "principal" uses permitted in the "A Agricultural Residential District" are (1) agricultural farms, truck gardens, greenhouses, plant nurseries, orchards, grain storage facilities, and the usual agricultural farm buildings and structures; (2) single-family dwellings; (3) roadside stands offering for sale agricultural products produced on the premises; (4) churches, seminaries, and convents, including

residences for pastors and teachers; (5) public and parochial schools and colleges; (6) publicly owned and operated buildings and facilities such as community centers, auditoriums, libraries, and museums; (7) fire stations; (8) public parks and recreation areas, playgrounds, and forest and conservation areas, including commercial uses and campgrounds under franchise of county or state governmental agencies; (9) *private recreation areas and facilities, including lakes, ponds, country clubs, golf courses, and swimming pools*; (10) public utility distribution systems, substations, terminal facilities, and reservoirs; (11) railroads; (12) irrigation facilities; and (13) hospitals and eleemosynary institutions. No special permit is required for these principal uses.

The conditional uses allowed in agricultural residential districts include (1) private and commercial kennels and facilities for raising, breeding, and boarding of dogs and other small animals; (2) confined feeding of livestock and feedlots; (3) sanitary landfills; (4) radio and television towers and transmitters; (5) airports (defined as "any area which is used or is intended to be used for the taking off and landing of aircraft, including helicopters, and any appurtenant areas which are used or are intended to be used for airport building or facilities, including open spaces, taxiways, and tie-down areas"; aircraft are defined as "any contrivance, now known or hereafter invented, for use or designed for navigation of or flight in the air or outer space, including missiles"); (6) mobile home parks; (7) nonfarm single-family dwellings; (8) home occupations; (9) extraction and processing of rock, gravel and sand, clay, and dirt; (10) temporary trailers; (11) *commercial recreational areas, including facilities for fishing, shooting, hunting, auto racing, cycle clubs, bridle clubs, etc.*; (12) churches, seminaries, and convents, including residences for pastors and teachers; (13) commercial camping areas; (14) public and parochial schools and colleges; (15) publicly owned and operated buildings and facilities such as community centers, auditoriums, libraries, and museums and privately owned noncommercial museums and historic areas; (16) hospitals, nursing homes, and eleemosynary institutions; (17) billboards; and (18) signs.

Conditional uses of land or buildings, as specified for each zoning district, are subject to the issuance of a special use permit with the following exception:

> Where a building or structure in the use thereof, or use of land lawfully exists on the effective date of this ordinance, then such use is classified by this ordinance as an allowable conditional use in the zoning district where it is located. The existing building or structure and its use thereof, or the use of land where no building or structure is involved comprising such a conditional use, shall be considered a lawful conditional use, except a special use permit shall be required for any expansion of physical development for such conditional use . . . .

The defendants have not applied for a special use permit to operate a model airplane airfield on the Startzer property. The plaintiffs contend the defendants are required to obtain a special use permit because the lease of 1 acre by Startzers to the club constituted a commercial recreation area as defined in the ordinance. The defendants contend that their use of the land is that of a private recreation facility, which is a principal permitted use, and that they are not required to have a special use permit.

At this point, we note that the parties rely heavily on the testimony of expert witnesses in support of their respective interpretations of the Springfield zoning ordinances. We commented in *Sasich v. City of Omaha*, 216 Neb. 864, 347 N.W.2d 93 (1984), that expert testimony is relevant and admissible only if it tends to help the trier of fact understand the evidence or to determine a fact issue and that expert testimony concerning the status of the law does not tend to accomplish either of these goals. Expert testimony concerning a question of law is generally not admissible in evidence. See, *Sasich v. City of Omaha, supra*; Neb. Rev. Stat. §§ 27-401, 27-402, and 27-702 (Reissue 1989). The interpretation of a zoning ordinance presents a question of law, and we decline to consider any expert testimony as to what constitutes a "commercial" or a "private" recreational use under the Springfield zoning ordinances.

The zoning ordinances at issue in this case regulate the actual

use of or activity on the land, not the ownership thereof. Similarly, this court has said:

> Mere ownership of real property imposes no responsibility for a nuisance on it, unless the owner is instrumental in causing the nuisance. A tenant in possession is liable for a nuisance by him created on the premises of his landlord, but the landlord is not liable for such a nuisance created by his tenant, unless the landlord authorized or contributed to the causing or maintaining of the nuisance.

City of Omaha v. Hugh Murphy Construction Co., 114 Neb. 573, 577, 208 N.W. 667, 668 (1926). The lease of 1 acre by Startzers to the club does not, in itself, constitute a "commercial recreation area" or a commercial use under the Springfield zoning ordinances. The use we are concerned with in this case involves the actual activities of members of the Startzers' tenant, Western R/C Flyers. The issue presented is whether the club is engaged in a private recreational activity or whether it is operating a commercial recreational area for purposes of the Springfield zoning ordinances.

The term "commercial," as used in the law of zoning, denotes a use for profit. See, e.g., *Imbergamo v. Barclay*, 77 Misc. 2d 188, 352 N.Y.S.2d 337 (1973). The record shows, however, that Western R/C Flyers is a nonprofit corporation and does not derive a financial profit from its use of the Startzer property. The Springfield zoning ordinances specifically include "private recreation areas and facilities, including lakes, ponds, country clubs, golf courses, and swimming pools" as uses permitted on the land in question as a matter of right. Interpreting a similarly worded ordinance, the court in *Henderson v. Zoning Appeals Bd. of Jefferson Parish*, 328 So. 2d 175, 178 n.5 (La. App. 1975), *cert. denied* 331 So. 2d 474 (La. 1976), noted that in this context, private recreational use was not limited "to use, for example, as a back yard swimming pool by an individual and members of his family and guests."

We conclude that Western R/C Flyers has been using the Startzer property for private recreational purposes and not for commercial profit. Under the Springfield zoning ordinances, the land may be used for such purposes as a matter of right, and the defendants were not required to obtain a special use permit.

Since the defendants were engaged in a private recreational activity, we need not address the plaintiffs' contentions that the defendants were operating an "airport" in violation of the zoning ordinances.

The plaintiffs next contend that the noise generated by the model airplanes constitutes a nuisance. In *Burgess v. Omahawks Radio Control Org.*, 219 Neb. 100, 101-02, 362 N.W.2d 27, 29 (1985), we said:

> The burden rests on the one complaining to establish that the use being made of the property must necessarily create a nuisance. . . . It is generally recognized that under certain circumstances noise may constitute a nuisance and be enjoined. Generally, noise is not a nuisance per se, but it may be of such a character as to constitute a nuisance in fact, which may serve as the basis of an action at law or in equity, even though it arises from the operation of a factory, industrial plant, or other lawful business or occupation. Whether noise is sufficient to constitute a nuisance depends upon its effect upon an ordinary, reasonable man, that is, a normal person of ordinary habits and sensibilities. Relief cannot be based solely upon the subjective likes and dislikes of a particular plaintiff, and must be based upon an objective standard of reasonableness. To justify abatement of a claimed nuisance, the annoyance must be such as to cause actual physical discomfort to one of ordinary sensibilities. It is presumed, in the absence of evidence to the contrary, that a plaintiff has ordinary sensibilities.

On this issue, the plaintiffs testified that planes were flown over the Startzer property every day of the year, weather permitting, and that the planes made an irritating high-pitched "winding" [sic] noise. Apparently, anywhere from one to seven planes can be flown at any one time. The plaintiffs and one other witness testified that the noise caused them to become anxious or frustrated, thereby causing stomach problems, headaches, and/or loss of sleep. They also testified that the flying of model airplanes near or over their property prevented them from enjoying gardening, working in the home, or otherwise enjoying their property. Defendant Jay Startzer and four other

abutting property owners or neighbors testified, however, that they were not bothered by the airplanes or the noise. There was no evidence presented regarding the measurement of sound levels in decibels.

Having reviewed the record de novo, and taking into consideration the circumstances of this case and our decision in *Burgess v. Omahawks Radio Control Org., supra*, we conclude that the activities of Western R/C Flyers, although annoying to the plaintiffs, do not rise to the level of a private noise nuisance.

The plaintiffs finally contend that the defendants have violated their statutory right to privacy. Neb. Rev. Stat. § 20-203 (Reissue 1987) provides: "Any person, firm, or corporation that trespasses or intrudes upon any natural person in his or her place of solitude or seclusion, if the intrusion would be highly offensive to a reasonable person, shall be liable for invasion of privacy." This statute is similar to Restatement (Second) of Torts § 652 B at 378 (1977), which provides: "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." The Restatement, *supra* at comment *a.* at 378, states that

> [t]he form of invasion of privacy covered by this Section does not depend upon any publicity given to the person whose interest is invaded or to his affairs. It consists solely of an intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.

The illustrations of invasions of privacy accompanying § 652 B encompass such situations as a reporter's entering a hospital room and taking the photograph of a person suffering from a rare disease; "window peeking" or wiretapping by a private detective; obtaining access to a person's bank records pursuant to a forged court order; or the continuance of frequent telephone solicitations. It does not appear that § 20-203 was designed to protect persons from the type of alleged intrusion involved in this case. In any event, the plaintiffs have failed to

establish that the defendants' activities constitute a nuisance or rise to the level of being "highly offensive to a reasonable person." The plaintiffs' assignment of error is without merit.

In its decree, the trial court found that there was evidence that the defendant Western R/C Flyers had allowed model airplanes to fly over the airspace of the plaintiffs, although the trespassing was infrequent and not done intentionally.

Notwithstanding that finding, the trial court enjoined the defendant Western R/C Flyers from causing *its* model airplanes to fly over the airspace immediately above the plaintiffs' property or to land on the plaintiffs' property. The trial court further provided that any future trespass by Western R/C Flyers would constitute a violation of the injunction, which might be enforced by any plaintiff upon the filing of an application to determine a fine. The trial court then ordered that "[t]he fine shall be $10.00 for each airspace violation and $25.00 for each time a plane has landed on any of Plaintiffs' property."

There is no cross-appeal, and the defendant Western R/C Flyers in its brief states that the remedy fashioned by the district court should be upheld. For that reason we do not consider or make any determination in regard to that part of the decree.

The judgment of the district court is affirmed.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

HOWARD L. SCHMITT, APPELLANT, V. PEGGY JO SCHMITT, APPELLEE.

477 N.W.2d 563

Filed December 6, 1991. No. 89-722.

1. **Child Support: Modification of Decree: Appeal and Error.** The standard of review for modification of a child support order is de novo on the record, and the decision of the trial court will be affirmed absent an abuse of discretion.

2. **Child Support: Modification of Decree.** The paramount concern in modification of child support is the best interests of the children.
3. **Child Support: Modification of Decree: Proof.** The party seeking to modify a child support order must show a material change in circumstances which occurred subsequent to the entry of the original decree and was not contemplated when the decree was first entered.
4. **Child Support: Modification of Decree: Rules of the Supreme Court.** The adoption of the Nebraska Child Support Guidelines effective October 1, 1987, constituted a material change of circumstances sufficient to justify consideration of proposed modification of child support orders entered before that date.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Remanded with directions.

Vince Dowding, Arend R. Baack, and, on brief, Cathleen H. Snell, of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellant.

Kay E. Tracy, of The Legal Professional Corporation of Howard E. Tracy, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

Petitioner, Howard L. Schmitt, appeals from an order of the Hall County District Court increasing his child support payments. On appeal he alleges the district court erred in "finding that there had been a material or substantial change of circumstances since the original Decree was entered."

The marriage between petitioner and the respondent-appellee, Peggy Jo Schmitt, was dissolved on August 28, 1987. They have three children, born July 3, 1978, September 6, 1980, and May 15, 1984. Appellee wife agreed to a "Property Settlement Agreement." In part, the agreement provided that she received custody of the three children and that the appellant husband was responsible for support payments of $100 per month per child for the first 36 months and $150 per month per child thereafter. The property settlement agreement was approved by the court. There was no language in the decree indicating what the parties had considered in deciding on the amount of child support. The amount was less in the first 3

years to enable appellant to pay outstanding loans, including loans on his motor home. Other terms in the agreement provided for disposition of personal and real property of the parties. The agreement provided that neither party would pay alimony to the other.

Appellee was not present at the final hearing on August 19, 1987, nor was she represented by counsel. In 1985, the Nebraska Legislature authorized child support guidelines. The Nebraska Supreme Court adopted guidelines on September 10, 1987, to become operative on October 1, 1987. Appellee was not aware of the existence of the proposed guidelines at the time of the dissolution of her marriage. Whether appellant or his counsel knew of the proposed guidelines is not shown in the record. Appellee contends that the guidelines would suggest a total child support obligation for the appellant of approximately $880 per month.

Appellant's take-home pay has not increased since the original decree was entered, but his employer has covered the increased costs of appellant's health insurance, which coverage remains the same. Appellant sold the motor home awarded to him and used the proceeds to pay off loans and to buy a van, on which he is now making payments similar to those made on the motor home. Appellee's salary has increased. Appellant's living expenses have not changed substantially, but appellee testified that the children's expenses have increased to approximately $285 per month, including $150 in child care and $50 in increased utility bills. Appellant has voluntarily paid some of the children's increased expenses.

Appellee sought modification of the child support order because of a change in circumstances. The appellee alleged, inter alia, that the child support guidelines enactment, in itself, after the decree was entered herein constituted a change of circumstances sufficient to justify consideration of a request to modify the support. We agree with that position.

Appellee asked that the Supreme Court guidelines be used in determining the amount of support. A hearing was held on appellee's motion on May 26, 1989. On June 1, 1989, the court ordered appellant to increase his child support payments to $250 per month per child, commencing July 1, 1989. The court

did not state the basis for its decision. Appellant timely appealed.

The standard of review for modification of a child support order is de novo on the record, and the decision of the trial court will be affirmed absent an abuse of discretion. *Sanchez v. Sanchez*, 231 Neb. 963, 439 N.W.2d 82 (1989). When the evidence is conflicting in a child support modification hearing, this court may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. See, *Dobbins v. Dobbins*, 226 Neb. 465, 411 N.W.2d 644 (1987); *Graber v. Graber*, 220 Neb. 816, 374 N.W.2d 8 (1985).

The paramount concern in modification of child support is the best interests of the children. See *Wagner v. Wagner*, 224 Neb. 155, 396 N.W.2d 282 (1986). However, merely arguing that the original decree is not in the best interests of the children is not sufficient, as it would be if the action were a direct appeal from the original decree. See *Helgenberger v. Helgenberger*, 209 Neb. 184, 306 N.W.2d 867 (1981). This court does not treat an action to modify support as a retrial of the original case or a review of the equities of the original decree. See *Tworek v. Tworek*, 218 Neb. 808, 359 N.W.2d 764 (1984).

The party seeking to modify a child support order must show a material change in circumstances which occurred subsequent to the entry of the original decree and was not contemplated when the decree was first entered. See *Sanchez, supra*. In determining if a material change of circumstances has occurred, we have considered factors such as

> a change in the financial resources or ability to pay on the part of the parent obligated to pay support, needs of the child or children for whom support is paid, good or bad faith motive of the obligated parent in sustaining a reduction of income, and the duration of the change, namely, whether the change is temporary or permanent.

Morisch v. Morisch, 218 Neb. 412, 413, 355 N.W.2d 784, 786 (1984).

Appellant contends that the factors considered by the court in finding a change of circumstance are all "circumstances that the parties have some control over, unlike changes in the law."

Reply brief for appellant at 11. In *Babka v. Babka*, 234 Neb. 674, 452 N.W.2d 286 (1990), however, we held that a change in federal tax law constituted a material change of circumstances which would justify modification of a support order. In *Babka*, the parties agreed that the noncustodial parent would claim the children as dependents on his income tax returns, but this agreement was not made a part of the decree when they divorced in 1980. In 1984, Congress amended the tax code to give the deductions automatically to the custodial parent, unless the custodial parent signed a written waiver. In 1987, the custodial parent in *Babka* claimed the children as deductions on her returns, although she had signed the waivers in 1985 and 1986. The court ordered the custodial parent to sign the waiver, finding that the change in the tax law and the mother's refusal to sign the waiver constituted a material change of circumstances justifying the modification.

Even if a change is material, it will not justify modification unless it was not in the contemplation of the parties when the original decree was entered. "For instance, it obviously is in the contemplation of all of the parties in every case that the children involved will grow older and that their needs will therefore change. That fact, standing alone, is not sufficient to justify a modification . . . ." *Graber, supra* at 819, 374 N.W.2d at 10. The court has limited this language from *Graber* in subsequent decisions. In *Dobbins v. Dobbins, supra* at 468, 411 N.W.2d at 646, the court indicated that the above language from *Graber* was an overstatement and that "[t]he better view . . . is that 'evidence of the increased age of children alone will not furnish a satisfactory basis for modification of child support *unless* accompanied by competent evidence of the actual increase in the cost of maintaining the children.' " (Emphasis in original.) We held it was plain error for the trial court in *Dobbins* to refuse to allow evidence on the children's increased expenses due to increasing age.

Similarly, in *Wagner v. Wagner, supra*, we limited the requirement that anticipated changes had to be within the contemplation of the parties, by requiring that those anticipated changes be specifically noted on the record at the time of the original order.

In 1984, Congress required the states to develop guidelines for child support awards. See 42 U.S.C. § 667 (Supp. V 1987). Noncompliance resulted in the loss of federal funds for various programs. Nebraska complied with the federal requirements with the passage of Neb. Rev. Stat. § 42-364.16 (Reissue 1988), which required the Nebraska Supreme Court to create guidelines that would serve as a rebuttable presumption in setting child support. As stated above, the court created the guidelines, which became operative October 1, 1987.

Since that time, federal and state statutes have been passed which, when implemented, may result in a statutory approach to solving the problem of proposed modifications of child support payments. This statutory approach may well render the concept of "material change of circumstances" of much less concern.

In 1988, amendments to the Social Security Act were adopted by the U.S. Congress. These amendments generally provide that the child support guidelines be updated every 4 years and that the states implement procedures to ensure the updating. See 42 U.S.C. §§ 666(a)(10)(A) and 667(a) (1988).

In response to the federal mandate, the Legislature of Nebraska passed 1991 Neb. Laws, L.B. 715, effective September 6, 1991. That law provides, in part, that the Supreme Court of Nebraska shall provide, by rule, for modification of child support payments.

Child support modifications in the future, then, may well be controlled by statutes and rules. That leaves for disposition in this case modification of child support payments ordered before the child support guidelines became operative. We hold, as stated above, that the adoption of the Nebraska Child Support Guidelines effective October 1, 1987, constituted a material change of circumstances sufficient to justify consideration of proposed modification of child support orders entered before that date.

The primary interest in determining the level of child support payments is the best interests of the children. It cannot be said that the best interests of children are served if three children whose parents divorced before October 1, 1987, are to live on child support payments at one level, while three children of the

same age whose parents in a comparable financial situation were divorced after October 1, 1987, receive a substantially higher level of support.

Other jurisdictions have determined that the adoption of the guidelines is a material change of circumstances justifying a hearing on a possible modification. In those jurisdictions, the intent to treat the guidelines as a material change appears either in statutory language or in the guidelines themselves. See, *Wogoman v. Wogoman*, 44 Ohio App. 3d 34, 541 N.E.2d 128 (1989); *Charlesworth v. Child Support Enf. Div.*, 779 P.2d 792 (Alaska 1989); *Matter of Marriage of Edwards*, 804 S.W.2d 653 (Tex. App. 1991); *In re Marriage of Miller*, 790 P.2d 890 (Colo. App. 1990).

This decision will only affect decrees entered before the effective date of the child support guidelines in Nebraska. On the facts before us, the adoption of the child support guidelines constitutes a material change of circumstances in this case.

We have no evidence in the record, however, to show that the child support guidelines were applied in determining the amount ordered by the district court. If the guidelines constitute a material change of circumstances, the guidelines must be used to determine the new support amount.

Appellee contends that "[t]he Guidelines indicate that Appellant's total child support obligation for the three . . . children should be approximately . . . $880.00 . . . per month . . . ." Brief for appellee at 6. There is nothing more in the record to show the application of the guidelines to the parties' situation. We remand with directions to calculate the amount of child support in accordance with the Nebraska Child Support Guidelines.

REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. GEORGE L. SHEPARD, APPELLANT.

477 N.W.2d 567

Filed December 6, 1991. No. 90-673.

1. **Constitutional Law: Criminal Law: Right to Counsel.** A defendant has the right to represent himself if he voluntarily and intelligently elects to do so.
2. **Right to Counsel: Effectiveness of Counsel.** If a defendant chooses to represent himself he must be held responsible for his ineptness of counsel even though that counsel was himself.
3. **Criminal Law: Effectiveness of Counsel.** A criminal defendant who proceeds pro se is held to the same trial standard as if he or she were represented by counsel.
4. **Convictions: Appeal and Error.** In reviewing a criminal conviction, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence. Such matters are for the finder of fact, and the verdict must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.
5. **Judges: Recusal: Appeal and Error.** A motion requesting a judge to recuse himself on the grounds of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law.
6. **Judges: Recusal: Presumptions.** A defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

George L. Shepard, pro se.

Don Stenberg, Attorney General, and Mark L. Ells for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

After jury trial, defendant was convicted of sexual assault in the first degree, in violation of Neb. Rev. Stat. § 28-319 (Reissue 1989), and of manufacturing child pornography, in violation of Neb. Rev. Stat. § 28-1463.03 (Reissue 1989). A posttrial hearing was held before the trial court, and the court found that defendant's conviction for first degree sexual assault was defendant's second conviction for that offense. After a

hearing, the trial court found defendant was not a mentally disordered sex offender. The court sentenced defendant to 40 years' imprisonment on the sexual assault charge, with the further provision that defendant would not be eligible for parole, pursuant to § 28-319(3), and to 10 years' imprisonment on the child pornography charge. The sentences were ordered to be served consecutively, and credit for jail time served was allowed.

Defendant, acting pro se, timely appealed. In this court defendant assigns 11 errors. As discussed below, we determine that none of the assigned errors have merit and that there is no plain error in the record. We affirm the convictions and sentences of defendant.

Difficulties were presented in the trial of this case, and in our review, because of defendant's insistence that he represent himself. The trial judge made every possible effort, without success, to persuade defendant to accept counsel, and exhibited great patience and impartiality in the face of defendant's ineptitude in defending himself and defendant's specific allegations that the judge had been bribed. Defendant voluntarily and intelligently elected to represent himself. In our review, we will deal with all of defendant's claims properly preserved, as best those claims may be discerned in defendant's wide-ranging, and in most instances inapposite, contentions.

We first note that a defendant has the right to represent himself if he voluntarily and intelligently elects to do so. See, Neb. Const. art. I, § 11; *State v. Kirby*, 198 Neb. 646, 254 N.W.2d 424 (1977); *Faretta v. California*, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). Defendant had some knowledge of the criminal process, since he had represented himself in a proceeding in this court. See *State v. Shepard*, 208 Neb. 188, 302 N.W.2d 703 (1981).

Once a defendant determines to represent himself, however, he assumes a great responsibility to himself to do so competently and properly and within rules and procedures set out for fully trained professional lawyers. As this court has said many times, "if a defendant chooses to represent himself he 'must be held responsible for his ineptness of counsel even though that counsel was himself.' " *State v. Stickney*, 222 Neb.

465, 467, 384 N.W.2d 301, 302 (1986), quoting from *State v. Brashear*, 201 Neb. 582, 270 N.W.2d 924 (1978). Or, as set out in *State v. Spotted Elk*, 227 Neb. 869, 876, 420 N.W.2d 707, 712 (1988), "a criminal defendant who proceeds pro se is held to the same trial standard as if he or she were represented by counsel."

Among the assignments of error is one contending that the evidence was insufficient to support a guilty verdict. In view of this allegation, we have examined the entire bill of exceptions, consisting of 752 pages. We have stated:

> In reviewing a criminal conviction, the Supreme Court does not resolve conflicts of evidence, pass on credibility of witnesses, evaluate explanations, or reweigh evidence. Such matters are for the finder of fact, and the verdict must be sustained if the evidence, viewed and construed most favorably to the State, is sufficient to support that conviction.

State v. Thomas, 236 Neb. 84, 90, 459 N.W.2d 204, 209 (1990).

Viewed in that light, the record shows the following: At about 7 a.m. on December 7, 1989, the mother of the child victim took the child to her regular babysitter. At that time the child was approximately 3 years 10 months old. Later that day, the child was taken by the babysitter's daughter, Christine Babb, to defendant's residence for the purpose of taking pornographic photographs. Twelve photographs of the child, in various poses and all showing the child undressed from the waist down, were taken. Two of the photographs appear to show the naked defendant sexually penetrating the child.

The child was returned to the babysitter's house later and was picked up by the child's mother about 4:30 p.m. On the way home, the child told her mother that "George licked my butt" and that George had stuck "that thing in her butt" that her father and her brothers have. The child referred to her vaginal area as her "butt." The mother then returned to her home, and the child was taken to the hospital. The child repeated much the same story to the doctor at the hospital and later that evening, at about 10:15 p.m., to an investigator with the Douglas County sheriff's office.

The evidence, particularly the photograph of the naked defendant together with the child unclothed from the waist

down, establishes beyond any doubt that defendant is guilty of a violation of § 28-1463.03, forbidding child pornography. Defendant admitted as much when, in giving his final argument to the jury, he stated:

> I admit being guilty of manufacturing. I admit I was wrong. I made a mistake. I deserve to be punished for that, but I don't believe I should be punished for a crime I did not commit. . . . Those pictures were took to pay off a trailer who was within a week of being repossessed.

In a crafty approach to the defense of the more serious crime of sexual assault in the first degree, defendant seizes on what is probably the only possible defense available to him on that charge. Defendant contends that the State did not prove any sexual penetration of the child victim by defendant. In that allegation, defendant is in error.

First of all, one photograph admitted in evidence depicts defendant inserting his penis in the child's vagina, and one depicts defendant inserting his penis in the child's anus. Defendant contends the pictures do not reflect penetration, but only the simulation of penetration. In support of his theory, defendant called a certified photographer to testify. The photographer, as an expert, testified generally that by taking pictures at different angles, dimensions could be made to appear different than they actually were. The photographer did not testify as to the pictures of defendant and the child victim, except to note that the victim appeared to him to be about 8 years old rather than 3. Although the photographer's testimony might be used to support an argument that the photographs of defendant and the child did not show penetration, apparently the jury did not believe that contention.

Other evidence established penetration. Such evidence included the child victim's statements to her mother, a doctor, and a deputy sheriff concerning the recent startling events that had happened, and the testimony of one of defendant's female companions, who had taken some of the photographs, that one picture showed "his penis inserted into her butt." Further evidence, if believed, established that defendant was alone with the child for some time.

In addition, defendant ignores the fact that penetration need

not necessarily be penile penetration to constitute penetration sufficient to establish a violation of the criminal statute forbidding sexual assault in the first degree. See Neb. Rev. Stat. § 28-318(6) (Reissue 1989).

The evidence of defendant's guilt is overwhelming. Most of the legal points argued by defendant were not preserved at trial and need not be discussed herein.

Others of defendant's assignments may be discussed briefly. Defendant contends he was "[d]enied proper access to the Courts by refusing defendant access to the law library to prepare and research for an adequate hearing in the defense of his up and coming trial in pro se, thereby dening [sic] the defendant due process, and misconduct of legal advisor." There is nothing in the record to support defendant's contention in this regard. First of all, defendant had the services of an experienced criminal trial lawyer at all times throughout the trial. This lawyer was denominated a "technical advisor" and was available to defendant. Defendant's only mentions in his brief complaining of this arrangement were that "[t]he conduct of the Public defender was gross" and that the public defender had not filed a motion to suppress. Brief for appellant at 8. It epitomizes defendant's contentions that he specifically refused the services of an attorney and now complains of the attorney's failure to act.

With regard to the lack of access to a library, there is nothing in the record to support this allegation. The record shows that early in the proceedings defendant requested a 30-day continuance, which was granted. Then, on May 3, 1990, the trial court set the trial for June 4, 1990, without objection by defendant. Defendant was before the court on May 22 and 24, 1990, and did not give any indication he was having any difficulty preparing for trial, nor did he ask for a continuance. Defendant was before the court twice, on May 31 and again on June 1, and did not complain or seek a continuance.

On the first day of trial, defendant again confirmed he wanted to represent himself. On the same day, defendant did seek a continuance of the trial, but only for the purpose of seeking additional time to pursue his motion to disqualify the trial judge, a matter discussed below. After the jury was

selected, defendant asked for and received additional time to prepare his opening statement. There is no merit to defendant's assignment of error in this regard.

Among defendant's assignments of error is "Motion to recuse Judge was proper, so not to deny due process." In this connection, at a hearing on one of defendant's many motions, defendant sought recusal of the judge and told the trial judge that defendant had "received a statement of evidence that you, yourself [the trial judge], had received a pay-off." The trial court granted defendant two separate hearings on this issue and the record made does not support defendant's contentions in any way. We have held that a motion requesting a judge to recuse himself on the grounds of bias or prejudice is addressed to the discretion of the judge, and an order overruling such a motion will be affirmed on appeal unless the record establishes bias or prejudice as a matter of law. See, *State v. Thomas*, 236 Neb. 84, 459 N.W.2d 204 (1990); *State v. Bird Head*, 225 Neb. 822, 408 N.W.2d 309 (1987). Further, a defendant seeking to disqualify a judge on the basis of bias or prejudice bears the heavy burden of overcoming the presumption of judicial impartiality. *State v. Bird Head, supra.*

Defendant's evidence on this issue did not present even a question of fact. His contention in this regard is without merit.

There is no basis to support any of defendant's wide-ranging contentions on this appeal. The judgment of convictions and the sentences imposed are affirmed.

AFFIRMED.

L.G.P., INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD R.G., APPELLANT, V. NEBRASKA DEPARTMENT OF SOCIAL SERVICES ET AL., APPELLEES.

477 N.W.2d 571

Filed December 6, 1991. No. 90-910.

1. **Habeas Corpus: Child Custody: Appeal and Error.** A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record.

2. **Habeas Corpus: Child Custody.** A question in every habeas corpus child custody case is the best interests of the child.
3. _____: _____. Proceedings in habeas corpus to obtain the custody of a child are governed by considerations of expediency and equity and should not be bound by technical rules.
4. **Habeas Corpus: Courts: Jurisdiction.** Nothing in the Nebraska Juvenile Code shall be construed to deprive the district courts of, inter alia, their habeas corpus jurisdiction.

Appeal from the District Court for Douglas County: JAMES M. MURPHY, Judge. Affirmed.

Connie Kearney for appellant.

Don Stenberg, Attorney General, and Royce N. Harper for appellees.

James S. Jansen, Douglas County Attorney, and Elizabeth G. Crnkovich, and Thomas M. Kenney, Douglas County Public Defender, and Regina T. Makaitis, amici curiae.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

L.G.P., appellant, is the mother of R.G., born November 12, 1989. On August 10, 1990, appellant took R.G. and her sister to a day-care home, leaving two other small children at home alone. Authorities, alerted to the possibility that R.G. was endangered in her current surroundings through reports of bruising under her eyes on at least two occasions, took all four of appellant's children into custody.

Appellant returned home approximately 3 hours later to find a handwritten note signed by a police officer tagged to the door. The note stated that the children had been taken into protective custody and listed a phone number to call for further information.

On August 13, appellant filed a petition for writ of habeas corpus in the district court for Douglas County. A hearing was set for 3 days later. The district court determined at the hearing only that due process had been accorded appellant in the removal of her children, and ordered the county attorney to file a petition regarding R.G. in the separate juvenile court. The

district court made no determination as to the evidence regarding abuse or neglect, nor did it inquire into the best interests of the child. L.G.P. appeals that decision.

Appellant assigns that the district court erred in (1) denying her petition for writ of habeas corpus; (2) failing to find the ex parte order of the separate juvenile court invalid; (3) failing to find that she was denied due process; (4) failing to find Neb. Rev. Stat. §§ 43-253, 43-255, 43-256, and 43-275 (Reissue 1988) unconstitutional insofar as these sections apply to dependent children; (5) failing to find that reasonable efforts were not made to keep the child in the home, pursuant to Neb. Rev. Stat. § 43-254 (Reissue 1988); (6) failing to find that the child was not placed in the least restrictive environment, as required by Neb. Rev. Stat. § 43-250 (Reissue 1988); (7) failing to find that the minor child was not in imminent danger and that the child's removal, without a warrant, was unlawful and violated appellant's right to due process of law; and (8) failing to find that the child was unlawfully detained pursuant to a county attorney's "hold."

This is the second appearance of this case in this court, and with the exception of those issues surrounding the denial of the petition for writ of habeas corpus, we have previously considered and decided all other assignments of error in *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991).

As to the appropriateness of the district court's denial of appellant's petition for writ of habeas corpus, we affirm. As we held in *In re Interest of R.G., supra*, appellant was afforded due process in the juvenile court.

A decision in a habeas corpus case involving the custody of a child is reviewed by this court de novo on the record. *Yopp v. Batt*, 237 Neb. 779, 467 N.W.2d 868 (1991); *Gaughan v. Gilliam*, 224 Neb. 836, 401 N.W.2d 687 (1987).

The remaining question present in every habeas corpus case is the best interests of the child. *Reynolds v. Green*, 232 Neb. 60, 439 N.W.2d 486 (1989).

Proceedings in habeas corpus to obtain the custody of a child are governed by considerations of expediency and equity and should not be bound by technical rules. *McCormick v. State*, 218 Neb. 338, 354 N.W.2d 160 (1984).

Pursuant to Neb. Rev. Stat. § 43-245(3) (Cum. Supp. 1990), nothing in the Nebraska Juvenile Code shall be construed to deprive the district courts of, inter alia, their habeas corpus jurisdiction. The district court's denial of the petition was proper, even absent production of findings regarding the best interests of the child, as the court may, and appropriately did, defer to the judgment of the juvenile court on that issue.

The assignments of error are without merit, and we therefore affirm.

AFFIRMED.

IN RE INTEREST OF D.P.Y. AND J.L.Y., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. P.Y., APPELLANT.

477 N.W.2d 573

Filed December 6, 1991. No. 91-230.

1. **Juvenile Courts: Evidence: Appeal and Error.** An appeal from an order of adjudication made by a juvenile court is reviewed by the Supreme Court de novo on the record. In a de novo review we disregard inadmissible evidence.
2. **Trial: Evidence: Hearsay: Appeal and Error.** The determination as to the admissibility of an excited utterance is a matter within the discretion of the trial court that will not be disturbed on appeal absent an abuse of discretion.
3. **Trial: Evidence: Hearsay.** For a statement to qualify as an excited utterance, the following criteria must be established: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event. The key requirement is spontaneity, which requires a showing the statements were made without time for conscious reflection.

Appeal from the District Court for Sarpy County: WILLIAM D. STALEY, Judge. Affirmed.

S. Caporale for appellant.

Michael D. Wellman, Sarpy County Attorney, and Mary Margaret Zerse Stevens for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The appellant is the father of a son, born May 14, 1981, and a daughter, born May 15, 1986. On July 30, 1990, a petition was filed in the juvenile court, alleging that the children were in a situation or engaged in an occupation dangerous to life or limb or injurious to their health or morals. See Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988).

After an evidential hearing, the juvenile court found and adjudged on January 24, 1991, that the children were children within the meaning of § 43-247(3)(a) and continued the matter for a disposition hearing. From the order of adjudication, the father has appealed to this court.

The record shows that the appellant and the children's mother were divorced on February 14, 1989. The mother was granted custody of the children, and the appellant was granted reasonable rights of visitation.

An amended petition was filed on October 15, 1990, which alleged that the appellant had engaged in inappropriate sexual contact with the children by having taken their clothes off or instructing them to take their clothes off for him, and by having touched their intimate body parts during visitations. The amended petition alleged that the appellant had emotionally abused his children by intimidating them, by threatening them with death in the event of their disclosure of the above-mentioned abuse, by having told them to lie to their babysitter and their mother about the events that had taken place during visitation, and by humiliating them by engaging in such unnatural and immoral acts with them during visitation. The amended petition further alleged that the mother felt she could not protect the children from further abuse, intimidation, and humiliation by the appellant and that she had noticed a steady deterioration in their emotional well-being and stability, as well as dramatic anxiety in the children at the mention of the appellant.

Following the adjudication hearing, the juvenile court did not find the allegations referring to the threats made to the children, the mother's feelings of not being able to protect the children, and the steady deterioration of the children's emotional well-being and stability to be true.

At the adjudication hearing, Lynda Sallach Madison, a psychologist, testified that she had performed a psychological evaluation of the daughter. She testified that the daughter's behavior and test results were consistent with those of children who experience physical aggression as part of their lifestyle.

Madison's psychological evaluation summary states that the daughter's behavior and responses suggest a high probability that she has been in a chaotic environment in which she does not feel able to control events; that she is fearful, unprotected, and confused; and that her test results show her expectation that men will be violent against women and children and that women will be helpless to protect themselves.

As part of the evaluation, the child made drawings of herself, her mother, and the appellant. Madison stated that based on the sexual content of the drawings and the child's verbalizations as to what they depicted, it is highly probable that she has been exposed to sexual experiences beyond her developmental capacity to understand. Madison concluded that it is highly probable that the daughter has experienced physical aggression and sexual abuse from a man at some time in the past.

Madison also testified that it would not be in the daughter's best interests to testify at the adjudication hearing.

Julie Ann McKee, a psychologist, testified that she had performed a psychological evaluation of the son and that her findings indicated that he had been physically, sexually, and/or emotionally abused.

During McKee's interview with the son, he reported to her that the appellant had inappropriately touched him and his sister. McKee found his report of sexual abuse to be highly credible and believed it was unlikely that he had been coached to make a false allegation because his emotional tone upon disclosure was predominantly sad, which is characteristic of sexual abuse victims in his age range; because his account was matter-of-fact and in no way dramatized or embellished; because he reported the sexual abuse in simple, concrete terms consistent with his age and verbal abilities; and because his psychological testing was consistent with that of children who have suffered emotional, physical, and/or sexual abuse.

The son also drew pictures of himself and his family. His

pictures of the appellant and the appellant's girl friend, with whom the appellant lives, depict the male and female sexual organs. The pictures of himself, his sister, and his mother do not indicate any sexual organs.

McKee also testified it would be too traumatizing for the son to testify at the adjudication hearing.

Over the appellant's objection as to inadmissible hearsay, the children's babysitter was allowed to testify that on July 16, 1990, while she was babysitting the children, the daughter was sitting on the floor watching television when she suddenly hit her cat so hard that it flew across the room and hit the wall. After she had hit the cat, she said, "That's how my daddy hits me." The babysitter responded by asking, "Your daddy hits you like that?" and the daughter said the appellant slapped her and her brother across the face and kicked them in the head and legs. According to the babysitter, the daughter then went on for about 2 hours telling about the physical and sexual abuse the appellant had done to them. The babysitter testified that she did not ask any questions but listened as the daughter described the things the appellant had done to her and her brother.

The juvenile court admitted the babysitter's testimony on the theory that it fell within the excited utterance exception to the hearsay rule contained in Neb. Rev. Stat. § 27-803(1) (Reissue 1989).

The babysitter testified that she told the children's mother what the daughter had told her and that the mother later informed the Douglas County sheriff's office. Officer Bruce Decker of the LaVista Police Department was contacted to assist in investigating the sexual abuse allegations because some of the incidents described could have taken place at the appellant's apartment in LaVista.

Officer Decker was unable to interview the daughter because she would not talk to him. However, he was able to interview the son, who described how he had been abused by the appellant and his girl friend.

Officer Decker was allowed to testify as to this information at the adjudication hearing over the appellant's objection as to inadmissible hearsay. The juvenile court admitted this testimony for the limited purpose of showing that the statements had been made and not for the truth of the matter

asserted.

The appellant and his girl friend testified and denied that there had been any sexual abuse of the appellant's children. However, the appellant admitted that he had struck the children's mother in the children's presence and that he frequently lost his temper with the daughter because she was not yet toilet trained. The appellant's girl friend testified that the appellant used profanities in front of the children when he was angry. The appellant's girl friend also testified that she had observed a bruise on the daughter's face, but she did not know how it got there.

The appellant's principal assignments of error relate to the admission of hearsay testimony by the juvenile court. The testimony of the babysitter as to the statements made to her by the daughter was admitted under the excited utterance exception. The determination as to the admissibility of an excited utterance is a matter within the discretion of the trial court that will not be disturbed on appeal absent an abuse of discretion. *In re Interest of R.A. and V.A.*, 225 Neb. 157, 403 N.W.2d 357 (1987).

Section 27-803(1) excepts from the hearsay rule "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." This exception to the hearsay rule is based on the theory that " 'circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication.' " *In re Interest of R.A. and V.A., supra* at 162, 403 N.W.2d at 362 (quoting 4 J. Weinstein & M. Berger, Weinstein's Evidence 803-33 (1985)).

For a statement to qualify as an excited utterance, the following criteria must be established: (1) There must have been a startling event, (2) the statement must relate to the event, and (3) the statement must have been made by the declarant while under the stress of the event. *In re Interest of R.A. and V.A., supra.* The key requirement is spontaneity, which "requires a showing the statements were made without time for conscious reflection." *Id.* at 166, 403 N.W.2d at 364.

In this case, there is no indication as to when the alleged abuse of the children as reported to the babysitter by the

daughter occurred. While the time interval may not be controlling, see *In re Interest of R.A. and V.A., supra*, it should be considered with regard to whether the statements were made without time for conscious reflection. The statements made by the daughter do not appear to relate to a startling event that had recently occurred, but were made to explain why she hit the cat. Accordingly, there is no showing that the statements were made while she was under the stress of a startling event, and the trial court abused its discretion in admitting the testimony of the babysitter as to what the daughter told her on July 16, 1990.

The testimony of Officer Decker as to what the son told him during the course of his investigation was admitted for the limited purpose of showing that the statements had been made, and not for the truth of the matter asserted. If Officer Decker's testimony is not considered for the truth of the matter asserted, it is irrelevant, and therefore, we do not consider it in the determination of this matter.

The Supreme Court reviews this proceeding de novo on the record. *In re Interest of R.A. and V.A., supra.* "In such de novo review, we must disregard impermissible or improper evidence," *In re Interest of D.L.S.*, 230 Neb. 435, 440, 432 N.W.2d 31, 35-36 (1988), and consider whether the children come within the meaning of § 43-247(3)(a), as established by a preponderance of the admissible evidence.

Disregarding the testimony of the babysitter and Officer Decker as to the statements made to them, we conclude that the evidence is sufficient to establish that the children are in a situation dangerous to life or limb or injurious to their health or morals as provided in § 43-247(3)(a). Both psychologists testified that the children's behavior is consistent with children who have been abused physically, emotionally, and/or sexually. Exhibits 1 through 6, which include the psychologists' reports and the children's drawings, are persuasive. Thus, we find by a preponderance of the evidence that the children are within the meaning of § 43-247(3)(a) and that the decision of the juvenile court should be affirmed.

AFFIRMED.

CAPORALE, J., not participating.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. NEBRASKA ASSOCIATION OF PUBLIC EMPLOYEES, LOCAL 61 OF THE AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, APPELLEE AND CROSS-APPELLANT, AND NEBRASKA ASSOCIATION OF CORRECTIONAL EMPLOYEES/AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, APPELLANT.

477 N.W.2d 577

Filed December 13, 1991. No. 89-737.

1. **Constitutional Law: Contracts: Arbitration and Award.** Provisions in Neb. Rev. Stat. §§ 25-2601 et seq. (Reissue 1989) authorizing binding arbitration of future disputes, and clauses in contracts providing for binding arbitration of future disputes, violate Neb. Const. art. I, § 13.
2. **Constitutional Law: Courts.** All courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy by due course of law, and justice administered without denial or delay.
3. **Declaratory Judgments: Judicial Construction: Statutes.** A declaratory judgment action is an appropriate method to obtain a judicial construction of a statute or determination of a statute's validity, including resolution of a challenge to the constitutionality of a statute.
4. **Declaratory Judgments: Injunction: Statutes.** A declaratory judgment that a legislative act is unconstitutional might be a basis for injunctive relief against enforcement of the act and, unrelated to a claim for damages, is more akin to relief through an equity action than to relief through a law action.
5. **Equity: Appeal and Error.** In an appeal of an equity action, this court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
6. **Constitutional Law: Statutes: Presumptions: Proof.** One claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional. A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality.
7. **Actions: Courts: Arbitration and Award.** An agreement to submit a future controversy to arbitration cannot be enforced, upon the theory that the powers of all the courts may always be invoked by every citizen for the protection of that citizen's rights, that the enforcement of a valid and subsisting cause of action is a substantial right, and that the citizen cannot be held to have bartered that away by any agreement made before a controversy arises.
8. **Contracts: Arbitration and Award: Public Policy.** Arbitration agreements entered into before a dispute arises oust the courts of jurisdiction and are thus against public policy and therefore void and unenforceable.
9. **Constitutional Law: Legislature.** The Legislature cannot lawfully act beyond the

limitations of the Constitution.

10. **Estoppel.** The doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand. The doctrine is to be applied with caution in such cases and only for the purpose of preventing manifest injustice.

11. _____. The elements of equitable estoppel are, as to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the party claiming the estoppel, to his injury, detriment, or prejudice.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Affirmed.

J. Murry Shaeffer for appellant.

Dalton W. Tietjen, of Tietjen, Simon & Boyle, for appellee Nebraska Association of Public Employees.

Robert M. Spire, Attorney General, and Charles E. Lowe for appellee State.

Mark D. McGuire and Scott J. Norby, of Crosby, Guenzel, Davis, Kessner & Kuester, for amicus curiae Nebraska State Education Association.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Two labor unions, one a cross-appellant, appeal a trial court declaratory judgment holding unconstitutional (1) portions of the Nebraska Uniform Arbitration Act that purport to validate agreements to submit future disputes to binding arbitration and (2) clauses in two labor contracts which require the unions, their members, and the employer involved to submit future disputes to binding arbitration.

We hold that (1) provisions in Neb. Rev. Stat. §§ 25-2601 et

seq. (Reissue 1989) authorizing binding arbitration of future disputes, and (2) clauses in contracts providing for binding arbitration of future disputes, violate Neb. Const. art. I, § 13. That constitutional provision dictates that "[a]ll courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation, shall have a remedy by due course of law, and justice administered without denial or delay."

Accordingly, we affirm the judgment of the district court for Lancaster County.

FACTUAL BACKGROUND

This action for declaratory judgment was instituted by Nebraska's Attorney General. It names as defendants the Nebraska Association of Public Employees, Local 61 of the American Federation of State, County, and Municipal Employees (NAPE), and the Nebraska Association of Correctional Employees/American Federation of State, County, and Municipal Employees (NACE). NAPE is the certified exclusive collective bargaining representative of state employees in the health and human care nonprofessional bargaining unit; the engineering, science, and resources bargaining unit; the maintenance, trades, and technical bargaining unit; and the social services and counseling bargaining unit. NACE is the certified exclusive collective bargaining representative of state employees in the protective service bargaining unit. The employer involved is the State of Nebraska.

In 1987, the Legislature enacted the Uniform Arbitration Act (the Act). It provides in relevant part that "[a] provision in a written contract to submit to arbitration any controversy thereafter arising between the parties . . . is valid, enforceable, and irrevocable. . . ." § 25-2602.

On February 9, 1988, respective representatives of NAPE, NACE, and the State of Nebraska, as an employer, executed separate collective bargaining agreements effective for the period of July 1, 1988, through June 30, 1989. Both unions proposed that the contracts contain provisions for binding arbitration of certain disputes which might arise after execution of the contracts. The State agreed to those provisions only after

letters of agreement were executed by representatives of NAPE and NACE, acknowledging that Nebraska's Attorney General had issued an opinion declaring unconstitutional the Act's provisions for binding arbitration. NAPE's letter of agreement provided:

> It is understood by the parties that the Nebraska Attorney General has issued an opinion that final and binding arbitration is unconstitutional, and the parties also acknowledge that the Attorney General may file a legal action seeking to resolve the constitutionality issue. In such case the Union agrees to serve as defendant in such law suit and to pay the costs of defending such law suit.

The letter of agreement signed by NACE's representative is similar to the one signed by NAPE's representative.

The NAPE contract contains two provisions for final and binding arbitration between the State and the affected employees. Paragraph 1.6 contains provisions for final and binding arbitration regarding terms and conditions of employment. Paragraph 4.11 contains provisions for final and binding arbitration regarding resolution of employee grievances. The NACE contract contains a provision similar to paragraph 4.11 of NAPE's contract.

Before the State filed suit, NAPE invoked both paragraphs 1.6 and 4.11 of its contract. The State responded by refusing to submit to arbitration. Thereafter, Nebraska's Attorney General filed this declaratory judgment action. He asked the trial court to invalidate the final and binding arbitration clauses of the labor contracts and to declare provisions of the Act unconstitutional that authorize binding arbitration of future disputes.

ASSIGNMENTS OF ERROR

Combined, the errors assigned by NAPE and NACE challenge the district court rulings that (1) the portion of § 25-2602 of the Act which authorizes agreements to submit disputes to arbitration violates public policy and is contrary to Neb. Const. art. I, § 13; (2) § 25-2613(a) violates Neb. Const. art. I, § 13, in that it does not provide for meaningful review of an arbitrator's decision; (3) clauses of the labor contracts

between the State and NAPE and NACE which provide for final and binding arbitration are unconstitutional; and (4) the State is not equitably estopped from challenging the validity and enforceability of the labor contract provisions regarding arbitration.

STANDARD OF REVIEW

Under Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1989), a declaratory judgment action is an appropriate method to obtain a judicial construction of a statute or determination of a statute's validity, including resolution of a challenge to the constitutionality of a statute. See *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989). A declaratory judgment that a legislative act is unconstitutional might be a basis for injunctive relief against enforcement of the act and, unrelated to a claim for damages, is more akin to relief through an equity action than to relief through a law action. *Id.* Consequently, in the present appeal we apply the standard for review of an equity appeal:

> In an appeal of an equity action, this court tries factual questions de novo on the record and reaches a conclusion independent of the findings of the trial court; provided, where the credible evidence is in conflict on a material issue of fact, we consider and may give weight to the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

State ex rel. Spire v. Strawberries, Inc., ante p. 1, 4, 473 N.W.2d 428, 432 (1991). One claiming that a statute is unconstitutional has the burden to show that the questioned statute is unconstitutional. *Id.* A statute is presumed to be constitutional, and all reasonable doubts will be resolved in favor of its constitutionality. *Id.*

CONSTITUTIONALITY OF § 25-2602

The earliest Nebraska case to address the validity of contract provisions which compel parties to arbitrate future disputes was *German-American Ins. Co. v. Etherton*, 25 Neb. 505, 41 N.W. 406 (1889). This court held void a clause in an insurance policy which required arbitration of the amount of the claim as a condition precedent to bringing an action in court against the

company. "Where a policy provides that the whole matter in controversy between the parties, including the right to recover at all, shall be submitted to arbitration, the condition is void. The effect of such a provision is to oust the courts of their legitimate jurisdiction, which the parties cannot do." *Id.* at 508, 41 N.W. at 406.

In a line of decisions that followed *German-American Ins. Co.*, this court reiterated its concern that such clauses in a contract would oust the courts of their jurisdiction. See, e.g., *National Masonic Accident Association v. Burr*, 44 Neb. 256, 62 N.W. 466 (1895); *Schrandt v. Young*, 62 Neb. 254, 86 N.W. 1085 (1901). In two cases decided in 1902, this court explicitly grounded this policy in Neb. Const. art. I, § 13.

The question presented in *Hartford Fire Ins. Co. v. Hon*, 66 Neb. 555, 92 N.W. 746 (1902), was the validity of a provision in an insurance contract which required that the question of the amount of loss be submitted to arbitrators. This court held that such a provision was an unenforceable violation of Neb. Const. art. I, § 13, because it ousted the courts of jurisdiction. The court stated that an agreement to submit a future controversy to arbitration cannot be enforced, upon the theory that the powers of all the courts may always be invoked by every citizen for the protection of that citizen's rights, that the enforcement of a valid and subsisting cause of action is a substantial right, and that the citizen cannot be held to have bartered that away by any agreement made before a controversy arises. *Id.*

The text of Neb. Const. art. I, § 13, was quoted by this court in *Phoenix Ins. Co. v. Zlotky*, 66 Neb. 584, 92 N.W. 736 (1902). There this court reiterated that "whenever we say that the jurisdiction of courts may be contracted away in advance on any question, we open a leak in the dyke of constitutional guarantees which might some day carry all away." *Id.* at 588, 92 N.W. at 737.

This court has since frequently stated the rule that arbitration agreements entered into before a dispute arises oust the courts of jurisdiction and are thus against public policy and therefore void and unenforceable. See, e.g., *Babb v. United Food & Commercial Workers Local 271*, 233 Neb. 826, 448 N.W.2d 168 (1989); *Overland Constructors v. Millard School*

Dist., 220 Neb. 220, 369 N.W.2d 69 (1985). In restating this policy, the court has only infrequently explicitly cited Neb. Const. art. I, § 13. See, e.g., *Poppert v. Brotherhood of R. R. Trainmen*, 187 Neb. 297, 189 N.W.2d 469 (1971); *Rentschler v. Missouri P. R. Co.*, 126 Neb. 493, 253 N.W. 694 (1934). Nonetheless, it is clear that the public policy consistently relied upon by this court is grounded in Neb. Const. art. I, § 13. Thus, NAPE's contention that the Legislature's enactment of the arbitration Act is a declaration of public policy in favor of arbitration is irrelevant. The Legislature cannot lawfully act beyond the limitations of the Constitution. *State ex rel. Caldwell v. Peterson*, 153 Neb. 402, 45 N.W.2d 122 (1950). Therefore, to the extent it provides for arbitration of future disputes, § 25-2602 violates Neb. Const. art. I, § 13, as do the binding arbitration clauses of the labor contracts involved here.

NACE assigns as error the trial court's holding that the State is not equitably estopped from challenging the validity and enforceability of the arbitration clauses in the contract. The doctrine of equitable estoppel will not be invoked against a governmental entity except under compelling circumstances where right and justice so demand. The doctrine is to be applied with caution in such cases and only for the purpose of preventing manifest injustice. *Jennings v. Dunning*, 232 Neb. 366, 440 N.W.2d 671 (1989). The facts in this litigation do not justify application of the doctrine of equitable estoppel against the State.

The elements of equitable estoppel are, as to the party estopped, (1) conduct which amounts to a false representation or concealment of material facts or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention, or at least the expectation, that such conduct shall be acted upon by, or influence, the other party or other persons; and (3) knowledge, actual or constructive, of the real facts; as to the other party, (4) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (5) reliance, in good faith, upon the conduct or statements of the party to be estopped; and (6) action or inaction based thereon of such a character as to change the position or status of the

party claiming the estoppel, to his injury, detriment, or prejudice. *Wheat Belt Pub. Power Dist. v. Batterman*, 234 Neb. 589, 452 N.W.2d 49 (1990).

The record reveals that there were no false representations or concealment of material facts on the part of the State. On the contrary, the State agreed to the inclusion of the arbitration clauses in the contracts only after securing the signatures of representatives of both NAPE and NACE on the letters of agreement. Those letters of agreement clearly establish the State's reservations regarding the constitutionality of the arbitration clauses. Both unions were fully informed of the State's position in that regard. Because the first element of equitable estoppel is not present in the case, this assignment of error is without merit.

It is unnecessary for us to consider the remaining assignment of error. Having held that agreements to arbitrate future disputes are unconstitutional, we need not address the sufficiency of the judicial review provisions contained in § 25-2613(a) of the Act.

The judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. KEVIN R. GROVES, APPELLANT.

477 N.W.2d 789

Filed December 13, 1991. No. 90-283.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, this court will uphold a trial court's findings of fact unless those findings are clearly erroneous.
2. _____: _____. In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion.
3. **Search Warrants: Affidavits.** This court has adopted the "totality of the circumstances" test set forth by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), to determine the sufficiency of an affidavit used to obtain a search warrant.

4. **Search Warrants: Probable Cause.** It is only the probability, and not a prima facie showing, of criminal activity which is the standard of probable cause for issuance of a search warrant.
5. _____: _____. In evaluating probable cause for the issuance of a search warrant, the magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.
6. **Search Warrants: Probable Cause: Appeal and Error.** The duty of the reviewing court is to ensure that the issuing magistrate had a substantial basis for determining that probable cause existed.
7. **Search Warrants.** An error in the street address of the place to be searched is not per se fatal to the validity of a warrant.
8. **Search Warrants: Police Officers and Sheriffs.** The test to determine the sufficiency of a search warrant's description is whether the place to be searched is described with sufficient particularity so as to enable the executing officer to find and identify the location with reasonable effort, and whether there is any reasonable probability that another site might mistakenly be searched.
9. **Search Warrants.** Factors to be considered in determining the validity of a warrant inaccurately describing the place to be searched are whether the place which was intended to be searched has previously been under surveillance or was being surveilled while the warrant was obtained and whether other parts of the description which are correct limit the property to be searched to one place.
10. _____. Evidence which emerges after the warrant is issued has no bearing on whether a warrant was validly issued.
11. **Motions to Suppress: Search Warrants: Police Officers and Sheriffs.** Evidence seized pursuant to a defective search warrant is not subject to being suppressed where the warrant is executed by officers who acted in good faith and reasonably believed that they were executing a valid warrant.
12. **Search Warrants: Probable Cause: Proof: Time.** Proof of probable cause justifying the issuance of a search warrant generally must consist of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time. However, whether the proof satisfies this test is determined by the circumstances of each case.
13. **Search Warrants: Time.** In general, no more than a reasonable time may have elapsed between the occurrence of facts and the issuance of a search warrant based thereon.
14. **Motions for Mistrial: Appeal and Error.** The decision as to whether to grant a motion for mistrial is a matter within the discretion of the trial court, and such a ruling will be upheld absent an abuse of that discretion.
15. _____: _____. Ordinarily, error cannot be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such material.
16. **Proof: Appeal and Error.** The defendant must prove that the alleged error actually prejudiced him, rather than creating only the possibility of prejudice.

17. **Rules of Evidence: Other Acts: Proof.** Neb. Rev. Stat. § 27-404(2) (Reissue 1989) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.
18. _____: _____: _____. Neb. Rev. Stat. § 27-404(2) (Reissue 1989) is an inclusionary rule permitting the use of relevant other crimes or acts for all purposes except proving that the defendant acted in conformity with his character.
19. **Controlled Substances: Evidence: Weapons.** In drug-related prosecutions, evidence relating to guns in a defendant's possession is relevant.
20. **Prior Convictions: Habitual Criminals: Proof: Right to Counsel: Waiver.** To prove a prior conviction for enhancement purposes and for habitual criminal proceedings, the State need only establish that at the time of the prior conviction, the defendant had or waived counsel.

Appeal from the District Court for Douglas County: STEPHEN A. DAVIS, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Robert M. Spire, Attorney General, and Kimberly A. Klein for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The defendant, Kevin R. Groves, was convicted by a jury of unlawful possession with intent to deliver methamphetamine and possession of a firearm by a felon. He was sentenced to a term of imprisonment of 2 to 4 years on the drug charge and to 13 months on the firearm charge. He has appealed and makes four assignments of error.

In his first assignment of error, the defendant contends that the trial court erred in overruling his motion to suppress evidence discovered during the search conducted on April 29, 1989, at 8104 Bedford Plaza, a claim he preserved by making proper objections at the time of trial. See *State v. Britt*, 237 Neb. 163, 465 N.W.2d 466 (1991).

On April 20, 1989, Deputy Sheriff William Jackson applied for a warrant to search for methamphetamine; various items

associated with the use, manufacture, and sale of drugs; and a 12-gauge pump-action shotgun, cut off at both the barrel and the stock to make it shorter than the legal dimensions. The items to be seized were alleged to be under the control or custody of Groves and concealed or kept at "8032 Bedford Plaza, Omaha, Douglas County, Nebraska, a single story, wood frame, single family dwelling, white in color, and any out buildings on the curtilage, and any vehicles on this property . . . ."

Deputy Jackson's affidavit set forth the grounds in support of issuance of the search warrant, alleging that he had been provided information by a confidential informant regarding Groves and the address to be searched. Deputy Jackson checked this information and found it to be true.

The informant had advised Deputy Jackson that he had been inside the residence described as 8032 Bedford Plaza and had observed Groves in possession of more than 2 grams of methamphetamine and a sawed-off 12-gauge shotgun. The informant further advised that Groves was a convicted felon and currently wanted for an active felony arrest warrant. The informant was able to pick out Groves from numerous booking photographs the informant was shown.

Deputy Jackson checked and found that Groves was a convicted felon with prior arrests for drug-related offenses, weapons-related offenses, and assault. Furthermore, Deputy Jackson found that Groves was currently wanted on 10 active warrants, 1 of which was for a felony.

On the basis of Deputy Jackson's affidavit, a judge of the county court issued the requested search warrant. The search warrant authorized a search of "8032 Bedford Plaza, Omaha, Douglas County, Nebraska, a single story, wood frame single family dwelling, white in color, and any out buildings on the curtilage, and any vehicles on this property . . . ."

On April 29, 1989, Deputy Jackson and several other officers executed the search warrant. The defendant was found asleep on a couch in the basement, and during the search of the basement, the officers discovered various items of contraband and a number of loaded weapons in the area immediately surrounding the defendant. The defendant was arrested, and

the warrant was returned along with an inventory to the county court on April 29.

The defendant filed a motion to suppress the items seized, alleging, among other things, that the affidavit in support of the search warrant did not state sufficient facts to show probable cause for issuance of the warrant and that the warrant violated the particularity clause of the fourth amendment to the U.S. Constitution because it contained an incorrect address.

The correct street address of the house where the defendant was found and from which the items were seized is 8104 Bedford Plaza. This was not discovered until after the warrant was executed.

At the suppression hearing, Deputy Jackson testified that the confidential informant had shown him the house that was later searched. Deputy Jackson had conducted surveillance of this house for approximately a week prior to obtaining the warrant to search, and he had observed the defendant outside the residence on several occasions.

The residence which was searched is located west of 80th Street on Bedford Plaza, which is a dead-end street with houses located only on the north side of the street. It is a white single-story, wood frame, single-family residence and is the last house on the street.

Deputy Jackson was unable to ascertain the numerical address from his surveillance of the house.

To get the house's street address which was used in the affidavit, Deputy Jackson used a computer-listed property file. The last house on the street was listed as number 8032.

The house that had been under surveillance and that Deputy Jackson searched was not 8032 Bedford Plaza. The residence at 8032 Bedford Plaza is located directly east of 8104 Bedford Plaza, the residence that was searched, and is a small, one-story, wood frame, green-colored house. The record does not show whether there is a street address posted on the house located at 8032 Bedford Plaza.

Deputy Jackson testified that there was no confusion as to the house where he was going to serve the search warrant. The white one-story house that had been under surveillance was the only house where the officers went to serve the warrant.

The defendant contends that the district court erred in overruling his motion to suppress because Deputy Jackson's affidavit requesting the search warrant was insufficient to establish probable cause for issuing the search warrant and because the search warrant contained an inaccurate description of the place to be searched.

The defendant alleges that the affidavit was insufficient because the reliability of the informant was not established by the affidavit.

In determining the correctness of a trial court's ruling on a motion to suppress, this court will uphold a trial court's findings of fact unless those findings are clearly erroneous. *State v. Sneed and Smith*, 231 Neb. 424, 436 N.W.2d 211 (1989). In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the trier of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion. *Id.*

This court has adopted the "totality of the circumstances" test set forth by the U.S. Supreme Court in *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983), to determine the sufficiency of an affidavit used to obtain a search warrant. *Sneed and Smith, supra.* It is only the probability, and not a prima facie showing, of criminal activity which is the standard of probable cause for issuance of a search warrant. *Id.*

In evaluating probable cause for the issuance of a search warrant, the magistrate must make a practical, commonsense decision whether, given the totality of the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of the persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Id.* The duty of the reviewing court is to ensure that the issuing magistrate had a substantial basis for determining that probable cause existed. *Id.*

In this case, the affidavit, under the totality of the circumstances, was sufficient to establish that the magistrate had probable cause for issuance of the search warrant because the informant had seen illegal narcotics at the residence where

the defendant was located. The reliability of the confidential informant's statements was established independently by Deputy Jackson. Deputy Jackson observed the defendant entering and leaving the residence that the informant had shown him. Deputy Jackson verified the informant's statement that the defendant was a convicted felon and wanted on a felony arrest warrant. Also, Deputy Jackson had the informant identify a photo of the defendant from a number of booking photographs.

The defendant also argues that the trial court erred in overruling his motion to suppress because the search warrant contained an inaccurate description of the premises to be searched, in violation of the fourth amendment's requirement of a particular description of the place to be searched and the persons to be seized.

It is not disputed by either party that the street address contained in the affidavit and search warrant is not the correct street address of the house that was actually searched. The address listed in the affidavit and search warrant is 8032 Bedford Plaza, and the correct address of the residence that was searched is 8104 Bedford Plaza. However, an error in the street address of the place to be searched is not per se fatal to the validity of a warrant. See *People v. Fragoso*, 68 Ill. App. 3d 428, 386 N.E.2d 409 (1979).

The test to determine the sufficiency of a search warrant's description is whether the place to be searched is described with sufficient particularity so as to enable the executing officer to find and identify the location with reasonable effort, and whether there is any reasonable probability that another site might mistakenly be searched. *United States v. Clement*, 747 F.2d 460 (8th Cir. 1984); *United States v. Gitcho*, 601 F.2d 369 (8th Cir. 1979). See, also, *State v. Walters*, 230 Neb. 539, 432 N.W.2d 528 (1988). Factors to be considered in determining the validity of a warrant inaccurately describing the place to be searched are: (1) that the address provided by the warrant, although incorrect, still describes the same piece of property; (2) that property intended to be searched is adjacent to that described in the search warrant and both are under the control of the defendant; (3) that the incorrect address describes a place

not in existence; (4) that other parts of the description which are correct limit the property to be searched to one place; and (5) that the place which was intended to be searched had previously been under surveillance or was being surveilled while the warrant was obtained. *United States v. Gitcho, supra.* See, also, *United States v. Clement, supra*; *State v. Walters, supra.*

In *Gitcho*, officers obtained a warrant for 4144 Geraldine, Apt. 7, Park Chalet Apartments, St. Louis County, Missouri. The address was incorrect. The address of the property that was searched was 4146 Park Chalet, Apt. 7, St. Louis County, Missouri, which property had been under surveillance by the executing officers prior to the search.

The U.S. Court of Appeals for the Eighth Circuit reversed the trial court's order suppressing any and all evidence gathered as a result of the search, finding that while the address in the warrant for the place that was searched was incorrect, it was reasonable for the location intended. The appellate court, in upholding the search, placed special importance on the facts that the officers executing the warrant personally knew which premises were intended to be searched because of their previous surveillance and that the premises which were intended to be searched were, in fact, those that were actually searched.

In *State v. Petta*, 354 So. 2d 563 (La. 1978), the Louisiana Supreme Court upheld a search where there was a discrepancy between the street number of the residence searched and that described by the search warrant. In that case, the evidence was discovered as the result of a warrant obtained to search property located at 1433 Crete Street, Apt. C. The residence was further described as a two-story pink stucco house trimmed in white.

The building was not marked with a street number. It was separated only by an alley from an adjacent residence numbered 1431. There was no 1433 Crete Street, and the correct street address of the pink stucco residence that was searched was 1435.

The Louisiana Supreme Court held that a description in a search warrant of property to be searched is sufficient when it reasonably enables the searching officers to ascertain and identify the place which alone was intended to be searched. The

court upheld the search because the place to be searched was described in sufficient detail to enable the officers to locate it with reasonable certainty and with the reasonable probability that they would not search the wrong premises.

The U.S. Court of Appeals for the 11th Circuit reversed a trial court's suppression of evidence and held that a search warrant described the premises to be searched with sufficient particularity because it directed the officers to the correct apartment number, because it confined their examination to that apartment, and because it placed the occupants of the apartment on sufficient notice of the officers' authority to search the premises. *United States v. Burke*, 784 F.2d 1090 (11th Cir. 1986). In that case, the warrant had the wrong building number, and the named street did not exist. The only correct information in the warrant was the number of the apartment to be searched. The court upheld the search because the warrant contained a detailed physical description of the building, minimizing the possibility that an apartment in any building other than the one described would be searched, and because the officer who pointed out the correct apartment to the officer executing the warrant knew precisely which premises were to be searched because he had previously been to that building with the confidential informant who provided the information supporting the request for the search warrant.

In *State v. Trasvina*, 16 Wash. App. 519, 557 P.2d 368 (1976), the Washington Court of Appeals upheld a search pursuant to a warrant that described the premises to be searched as " 'a two-story, white frame house with green trim, located geographically directly behind and East of 6604 Northeast 94th Avenue, Vancouver,' " although the correct description of the place that was searched " 'was a "two-story, white frame house with green trim located geographically directly behind and east of 6513 N.E. 94th Avenue . . . ." ' " *Trasvina, supra* at 521, 557 P.2d at 369. The defendants argued that the search was unlawful because the warrant did not particularly describe the premises because there could have been more than one house in the area that fit the description. In response to the defendants' argument, the court stated:

No evidence appears in the record that there were any

> other 2-story, white frame houses with green trim located near the 6600 block of 94th Avenue N.E. in Vancouver. Nor is there any evidence that the premises searched failed to conform to the description except for the address. The burden of proof as to a motion to suppress evidence is upon the movant. . . . In this case, Trasvina and Martin had the burden of showing the premises were not reasonably identified. That is, they had to show whether the house searched reasonably could have been confused with another house in the area described by the original warrant. They did not do so, and mere speculation will not suffice. Therefore, we hold that the premises were described with sufficient particularity in the original warrant.

Trasvina, supra at 523, 557 P.2d at 370-71.

In the present case, the defendant argues that the search was unlawful because the executing officers would have searched the wrong house if they had gone to 8032 Bedford Plaza. This argument lacks merit because the defendant failed to prove that 8104 Bedford Plaza could reasonably have been confused with 8032 Bedford Plaza or any other house in the area described by the warrant. Furthermore, there are additional circumstances to support the trial court's decision to uphold the search.

The record shows that the house at 8104 Bedford Plaza had been under surveillance by the officer executing the search warrant for a week prior to the obtaining of the search warrant. Deputy Jackson was not confused as to which house to search. The house that was searched matched the description in the warrant and was the residence that was intended to be searched. It is a single-story, wood frame, single-family dwelling, white in color. The house at 8032 Bedford Plaza is a green single-story, wood frame, single-family residence, and there is nothing in the record to show whether there are any other white single-story, wood frame, single-family homes on Bedford Plaza in the area west of 80th Street.

The description in the search warrant was reasonable for the location intended. The warrant describes the place to be searched with sufficient detail to enable the executing officer (in this case, Deputy Jackson) to locate it with reasonable certainty,

and there is no reasonable probability that the executing officer would mistakenly search another residence. Accordingly, the trial court did not err in overruling the defendant's motion to suppress the items seized pursuant to the search warrant.

There are additional reasons why the motion to suppress was properly overruled. In the present case, at the time Deputy Jackson requested the warrant, the information available to him indicated that the address of the premises he sought to search was 8032 Bedford Plaza. Under the circumstances, this was a reasonable address for that location, and Deputy Jackson had no reason to suspect that the warrant or the supporting affidavit was invalid because of an incorrect address. It was not until after the warrant was executed that it was discovered the address it listed was incorrect.

In *Maryland v. Garrison*, 480 U.S. 79, 107 S. Ct. 1013, 94 L. Ed. 2d 72 (1987), the U.S. Supreme Court held that evidence which emerges after the warrant is issued has no bearing on whether the warrant was validly issued.

In *Garrison*, Baltimore police officers obtained and executed a warrant to search the person and third-floor apartment of Lawrence McWebb for controlled substances and paraphernalia. The officers correctly stated the address and location of McWebb's apartment and reasonably believed that there was only one apartment on the described premises. However, the third floor was divided into two apartments, one occupied by McWebb and one by the defendant, Garrison. Before the officers discovered that the third floor contained two apartments, they saw and seized contraband in Garrison's apartment. The court held that the validity of the search depended on whether the executing officers' failure to realize the overbreadth of the warrant was objectively understandable and reasonable. The court found the officers' failure to realize the warrant's overbreadth was reasonable because the objective facts available to the officers at the time the warrant was sought suggested no distinction between the apartment requested to be searched and the third-floor premises.

The Court stated that if the officers had known, or if they should have known, that there were two separate apartments on the third floor of the address listed in the warrant, they

would have been obligated to exclude Garrison's apartment from the scope of the requested warrant. The constitutionality of the police officers' conduct was judged in light of the information available to them at the time they acted.

The Court stated:

> But we must judge the constitutionality of their conduct in light of the information available to them at the time they acted. Those items of evidence that emerge after the warrant is issued have no bearing on whether or not a warrant was validly issued. Just as the discovery of contraband cannot validate a warrant invalid when issued, so is it equally clear that the discovery of facts demonstrating that a valid warrant was unnecessarily broad does not retroactively invalidate the warrant. The validity of the warrant must be assessed on the basis of the information that the officers disclosed, or had a duty to discover and to disclose, to the issuing Magistrate. On the basis of that information, we agree with the conclusion of all three Maryland courts that the warrant, insofar as it authorized a search that turned out to be ambiguous in scope, was valid when it issued.

Garrison, supra at 480 U.S. at 85-86.

In *State v. Kleinberg*, 228 Neb. 128, 421 N.W.2d 450 (1988), we held that evidence seized pursuant to a defective search warrant is not subject to being suppressed where the warrant was executed by officers who acted in good faith and reasonably believed that they were executing a valid warrant.

In circumstances similar to those in the present case, the U.S. Court of Appeals for the Fifth Circuit held that evidence obtained during a search pursuant to a warrant which contained an incorrect street name was admissible under the good faith exception to the exclusionary rule. *U.S. v. Gordon*, 901 F.2d 48 (5th Cir. 1990). The court found that the incorrect street name in the search warrant was not a facial defect, which would prevent admission of evidence discovered during the search under the good faith exception to the exclusionary rule, because looking at the warrant or at both the warrant and the supporting affidavit, one would not suspect that the warrant was invalid.

The defendant also argues that because the warrant was not executed until 9 days after it was issued, the search was unconstitutional because the information contained therein was stale.

Proof of probable cause justifying the issuance of a search warrant generally must consist of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time. However, whether the proof satisfies this test is determined by the circumstances of each case. *State v. Eary*, 235 Neb. 254, 454 N.W.2d 685 (1990). In general, no more than a reasonable time may have elapsed between the occurrence of facts and the issuance of a search warrant based thereon. *State v. Kallos*, 193 Neb. 113, 225 N.W.2d 553 (1975).

In this case, the application for the warrant was based in part upon information received from the confidential informant, who had been inside the residence in question within the previous 72 hours. Under all of the circumstances in this case, we believe the facts justifying the issuance of the warrant were sufficiently closely related to the time of the issuance of the warrant to justify the finding of probable cause.

The warrant was issued on April 20, 1989. It was executed and returned on April 29, 1989.

Neb. Rev. Stat. § 29-815 (Reissue 1989) requires a warrant to be executed and returned within 10 days after its date of issuance. Since the warrant was executed within the statutory limits, the defendant's argument is without merit.

Among the items that were seized pursuant to the search and admitted into evidence at the defendant's trial were a "belt knife"; a 12-gauge shotgun and the shells that it was loaded with; a leather holster, a "High Standard" pistol that was contained within it, and the ammunition that was loaded into the weapon; a leather holster that had been fastened underneath a coffee table, a semiautomatic Beretta .22-caliber pistol that was contained within the holster, and the rounds of ammunition the pistol contained; an ankle holster used to hold the Beretta pistol; an assault pistol and the violin case in which it was contained; a toolbox containing numerous plastic bags, a homemade scoop, a triple-beam scale, a sifter, and a cutting

agent; a bag containing methamphetamine; syringes; and a spoon with traces of methamphetamine.

Deputy Jackson testified about the arrest of the defendant and the search of the basement area where the defendant was discovered. On direct examination, Deputy Jackson volunteered that the 12-gauge shotgun found near the defendant's head turned out to be stolen.

Counsel for the defendant objected to this testimony and moved for a mistrial out of the presence of the jury. The trial court overruled the defendant's motion, and upon bringing the jury back into the courtroom, the trial court instructed the jury that they should disregard the evidence that the shotgun was stolen.

For his second assignment of error, the defendant contends that the trial court erred by failing to grant a mistrial because Deputy Jackson's statement that the shotgun had been stolen was unfairly prejudicial to the defendant. The defendant argues that his credibility, which was a critical issue in this case, was damaged by the injection of Deputy Jackson's statement and that the damaging effect of the statement was not cured by the trial court's instruction to the jury.

The decision as to whether to grant a motion for mistrial is a matter within the discretion of the trial court, and such a ruling will be upheld absent an abuse of that discretion. *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987); *State v. Borchardt*, 224 Neb. 47, 395 N.W.2d 551 (1986). This court stated in *Borchardt* at 56, 395 N.W.2d at 557-58:

> A mistrial is properly granted when an event occurs during the course of a trial which is of such a nature that its damaging effects cannot be removed by proper admonition or instruction to the jury and would thus result in preventing a fair trial. Egregiously prejudicial statements of counsel, the improper admission of prejudicial evidence, and the introduction to the jury of other incompetent matters are examples of occurrences which may constitute such events. . . . Error cannot ordinarily be predicated on the failure to grant a mistrial if an objection or motion to strike the improper material is sustained and the jury is admonished to disregard such

material.

(Citations omitted.)

In *Jacobs*, this court upheld the trial court's refusal to grant a mistrial when the sheriff who testified "demonstrated a remarkable inability, or unwillingness, to focus upon and limit his responses to the questions asked of him." *Jacobs, supra* at 193, 410 N.W.2d at 475. We found the questions asked were not improper and there was no showing that the prosecutor was responsible for the sheriff's wanderings. When the defendants objected, the trial court instructed the jury to disregard the sheriff's responses, and in that case, the responses were cut off before any prejudicial statements were made.

The defendant in this case argues that unlike the situation in the *Jacobs* case, Deputy Jackson was not cut off before he made his prejudicial statement which was damaging to the defendant's credibility. The defendant contends that this prejudiced his case and prevented him from receiving a fair trial.

The defendant must prove that the alleged error actually prejudiced him, rather than creating only the possibility of prejudice. *State v. Gore*, 212 Neb. 287, 322 N.W.2d 438 (1982). While the credibility of the defendant was an important issue, there was an abundance of evidence that the jury had to disregard before it could find the defendant was not guilty.

The prosecutor's question to Deputy Jackson was not improper. There was no showing that the prosecutor was responsible for Deputy Jackson's response. The trial court instructed the jury to disregard Deputy Jackson's statement that the gun had been stolen, and the defendant has failed to show how that statement actually prejudiced the outcome of his trial. Under these circumstances, it was not an abuse of discretion for the trial court to refuse to declare a mistrial.

Prior to the trial, the defendant filed a motion in limine asking the court to exclude the 12-gauge shotgun, the knife, and the three 12-gauge shotgun shells which were loaded in the shotgun. The motion in limine further requested the court to order the State to elect which of the three weapons with barrels under 18 inches in length would be offered as evidence of the defendant's felon in possession of a firearm charge and

requested that evidence of the other two firearms be excluded. The trial court denied the defendant's motion.

For his third assignment of error, the defendant alleges that the trial court erred by denying the defendant's motion in limine regarding the introduction of the various weapons found at the time of the defendant's arrest and in failing to order the prosecution to elect which of the three firearms would be offered as evidence of the defendant's felon in possession of a firearm charge. The defendant argues that the evidence of the three guns with barrels less than 18 inches in length was irrelevant in that they have no connection to either count with which the defendant was charged and that even if the guns were relevant, they should have been excluded because their probative value was substantially outweighed by the danger of unfair prejudice.

Neb. Rev. Stat. § 27-404(2) (Reissue 1989) provides that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. It is well established that § 27-404(2) is an inclusionary rule permitting the use of relevant other crimes or acts for all purposes except to prove that the defendant acted in conformity with his character. *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986). The trial court did not abuse its discretion in admitting all of the firearms found in the immediate vicinity of the defendant, as there was a legitimate purpose for admission of all the firearms under each of the counts of the information.

The defendant was charged with possession with intent to distribute methamphetamine and with being a felon in possession of a firearm of less than 18 inches in barrel length. The evidence of weapons with barrels less than 18 inches in length was relevant to both charges, and the evidence was not unfairly prejudicial to the defendant's case.

In drug-related prosecutions, evidence relating to guns in a defendant's possession is relevant. *United States v. Milham*, 590 F.2d 717 (8th Cir. 1979). See, also, *United States v. LaGuardia*, 774 F.2d 317 (8th Cir. 1985). " 'Experience on the

trial and appellate benches has taught that substantial dealers in narcotics keep firearms on their premises as tools of the trade almost to the same extent as they keep scales, glassine bags, cutting equipment and other narcotics equipment.' " *Milham, supra* at 721 (quoting *United States v. Wiener*, 534 F.2d 15 (2d Cir. 1976), *cert. denied* 429 U.S. 820, 97 S. Ct. 66, 50 L. Ed. 2d 80).

The defendant also argues that the State should have been required to elect which of three weapons with barrels less than 18 inches in length it would use in proving the felon in possession charge. The defendant claims that he was prejudiced in preparing for trial because he did not know which of the firearms would be used as evidence against him.

The defendant's argument is without merit. The defendant knew which firearms were found, where they were found, and the circumstances of the finding. The guns were relevant to each charge. The fact that the State had alternate ways of proving each charge did not prejudice the defendant in preparing his defense in this case.

The defendant's fourth and final assignment of error pertains to the trial court's denial of his motion in limine regarding the admission of evidence that he had a prior conviction for burglary, which claim he preserved by making proper objections at trial. See *State v. Boppre*, 234 Neb. 922, 453 N.W.2d 406 (1990). The defendant argues that his prior conviction for burglary should have been excluded because the record in that case failed to affirmatively reflect that he was represented by counsel, that he waived counsel, or that he was advised of each and all of the constitutional rights set forth in *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

This court has held that to prove a prior conviction for enhancement purposes and for habitual criminal proceedings, the State need only establish that at the time of the prior conviction, the defendant had or waived counsel. *State v. Johns*, 233 Neb. 477, 445 N.W.2d 914 (1989). This rule is equally applicable to use of a prior conviction as proof that the defendant is a convicted felon.

The record in this case shows that the defendant had his

attorney present with him at each court appearance up to and including sentencing on the burglary charge. Accordingly, the prior conviction was properly admitted by the trial court.

The judgment is affirmed.

AFFIRMED.

SHANAHAN, J., concurring.

Although I concur that Groves' convictions must be affirmed, the majority has failed to address Groves' contention that probable cause was lacking for the search warrant, when executed, because the information on which the warrant was based had become "stale" and thereby rendered the search unreasonable. That contention deserves the court's attention.

Probable cause to search must exist for issuance of a search warrant and at the time the search warrant is executed. See *United States v. Lemmons*, 527 F.2d 662 (6th Cir. 1975). As the court pointed out in *United States v. Bedford*, 519 F.2d 650, 655 (3d Cir. 1975):

> The element of time can admittedly affect the validity of a search warrant. Since it is upon allegation of presently existing facts that a warrant is issued, it is essential that it be executed promptly, "in order to lessen the possibility that the facts upon which probable cause was initially based do not become dissipated." If the police were allowed to execute the warrant at leisure, the safeguard of judicial control over the search which the fourth amendment is intended to accomplish would be eviscerated. Thus, a search pursuant to a "stale" warrant is invalid.

In *Bedford*, the court further observed:

> Timeliness of execution should not be determined by means of a mechanical test with regard to the number of days from issuance, nor whether any cause for delay was per se reasonable or unreasonable. Rather it should be functionally measured in terms of whether probable cause still existed at the time the warrant was executed.

Id.

Although neither the fourth amendment to the U.S. Constitution nor article I, § 7, of the Nebraska Constitution prescribes a specific period for execution of a search warrant,

both Constitutions prohibit "unreasonable searches and seizures." Therefore, reasonableness, based on probable cause and required for a search, does place some constitutional limitation on the time for execution of a search warrant. A delay in executing a search warrant is constitutionally permissible only when the probable cause recited in the affidavit continues until the time of execution. *United States v. Nepstead*, 424 F.2d 269 (9th Cir. 1970). See, also, *United States v. Lemmons, supra*; *State v. Edwards*, 98 Wis. 2d 367, 297 N.W.2d 12 (1980); *State v. Yaritz*, 287 N.W.2d 13 (Minn. 1979).

Accordingly, a constitutionally impermissible delay in executing a search warrant may occur notwithstanding execution of the warrant within the time prescribed by Neb. Rev. Stat. § 29-815 (Reissue 1989): "The warrant must be executed and returned within ten days after its date [issuance]." The majority mistakenly applies § 29-815 as a per se rule and states that "[s]ince the warrant was executed within the statutory limits," Groves' contention that probable cause for the warrant had disappeared "is without merit."

Section 29-815 sets forth a ministerial procedure for return of an executed search warrant. See, *Commonwealth v. Cromer*, 365 Mass. 519, 313 N.E.2d 557 (1974); *United States v. Kennedy*, 457 F.2d 63 (10th Cir. 1972); *People v. Schmidt*, 172 Colo. 285, 473 P.2d 698 (1970); *State v. Hunt*, 454 S.W.2d 555 (Mo. 1970); *United States v. Haskins*, 345 F.2d 111 (6th Cir. 1965). However, § 29-815 also specifies the time within which an officer must execute a search warrant, namely, within 10 days after issuance of the search warrant. The 10-day limit for execution of a search warrant is not mandated by the U.S. Constitution or Nebraska Constitution, but is a legislatively expressed time limit for execution of a search warrant and does not, and constitutionally cannot, substitute a statutory per se rule of reasonableness in place of judicial review to determine whether a search is supported by probable cause when that warrant is executed. As construed and applied by the majority today, the determination of whether a search warrant has been executed within the duration of probable cause as the basis for a reasonable search and seizure is relinquished to the Legislature for expression in a statutory prescription, the per se rule of

reasonableness of time recognized by the majority in Groves' case, notwithstanding the constitutionally conferred power and corresponding obligation that only the judiciary may determine whether a search or seizure is reasonable and, therefore, permissible in light of the constitutional safeguards against an unreasonable search and seizure. In *People v. Hernandez*, 43 Cal. App. 3d 581, 588, 118 Cal. Rptr. 53, 58 (1974), the court rejected existence of a statutory per se rule of reasonableness found in a California statute which provided that " '[a] search warrant executed within the 10-day period shall be deemed to have been timely executed and no further showing of timeliness need be made.' " In *Hernandez*, the court concluded that a statute "which forecloses any inquiry into the continued existence of probable cause, [which inquiry] would prevent executions of search warrants in situations in which such an inquiry would reveal that the probable cause which existed at the time of the issuance had, in fact, completely disappeared at the time of the execution," would preclude judicial inquiry whether execution of the search warrant was reasonable and would, consequently, be unconstitutional. *People v. Hernandez, supra* at 589, 118 Cal. Rptr. at 58. See, also, *State v. Edwards, supra* (probable cause can disappear within the 5-day statutory period allowed for execution of a search warrant); *Donaldson v. State*, 46 Md. App. 521, 420 A.2d 281 (1980) (rejecting contention that a search warrant executed within the statutory 15-day period is, per se, timely in conformity with the constitutional safeguard against an unreasonable search and seizure).

Therefore, the proper inquiry for a reviewing court is whether probable cause dissipated into extinction during the interval between issuance of a warrant and its execution. See, *United States v. Lemmons*, 527 F.2d 662 (6th Cir. 1975); *U.S. v. Whitworth*, 856 F.2d 1268 (9th Cir. 1988). Pursuant to the preceding standard, the inquiry into probable cause for execution of a search warrant is the same as the inquiry for issuance of a search warrant, namely, whether there is probable cause to search.

We have stated:

> It is a general and well-established rule that the proof of

> probable cause which must be made before a search warrant may be issued must be of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at that time, and whether the proof meets this test must be determined by the circumstances of each case. Generally, it may be said that no more than a "reasonable" time may have elapsed, and the recital must be of facts so closely related to the time of the issuance of the warrant as to justify a finding of probable cause at the time.

State v. Kallos, 193 Neb. 113, 117, 225 N.W.2d 553, 556 (1975). See, also, *State v. Eary*, 235 Neb. 254, 454 N.W.2d 685 (1990) (probable cause involves the fair probability that contraband or evidence of a crime will be found in a particular place).

> The ultimate criterion in determining the degree of evaporation of probable cause, however, is not case law but reason. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base?), etc. The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later. The hare and the tortoise do not disappear at the same rate of speed.

Andresen v. State, 24 Md. App. 128, 172, 331 A.2d 78, 106 (1975).

> Where the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant.

United States v. Johnson, 461 F.2d 285, 287 (10th Cir. 1972). See, also, *State v. Eary, supra.*

In Groves' case, the search warrant was obtained on April 20, 1989, and executed 9 days later, on April 29, in the search for 2 grams of methamphetamine and a sawed-off 12-gauge shotgun. Therefore, the proper review is an inquiry to determine whether the probable cause at issuance of the warrant had disappeared by the time the search warrant was executed. After issuance of the search warrant, police, hoping to tie Groves to narcotics traffic, undertook surveillance of the residence where Groves was staying, but the record does not reflect what, if any, information the police gained during their surveillance.

We have stated:

> In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the "trier of fact" and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress. *State v. Blakely, supra.*

State v. Abdouch, 230 Neb. 929, 930, 434 N.W.2d 317, 319 (1989). Accord *State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202 (1989).

Some courts have determined that probable cause dissipates rather rapidly when small, or unspecified, amounts of narcotics or controlled substances are involved. See, *State v. Boneventure*, 374 So. 2d 1238 (La. 1979) (when the search warrant affidavit stated that 2 days before issuance of the warrant, "a quantity" of marijuana was offered for consumption in defendants' residence, there was no basis for a reasonable belief that the marijuana was still in the defendants' residence at the time the warrant was issued, because the amount described in the affidavit was a "consumable" amount; hence, no probable cause); *People v David*, 119 Mich. App. 289, 326 N.W.2d 485 (1982) (when only a single marijuana sale

was involved and described in the search warrant affidavit without further allegation of other criminal activity involving a controlled substance, 3 days between the observation described in the search warrant and issuance of the warrant prevented probable cause for the search warrant). Other courts have been more lenient regarding the interval between an observation recounted in a search warrant affidavit as probable cause and issuance of the warrant; for example, notwithstanding the interval, probable cause existed for a search warrant in the following decisions: *People v. Mesa*, 14 Cal. 3d 466, 535 P.2d 337, 121 Cal. Rptr. 473 (1975) (an informant's observations, which occurred 6 days before issuance of the search warrant, were contained in the search warrant affidavit); *Grant v. State*, 130 Ga. App. 237, 202 S.E.2d 675 (1973) (according to the search warrant affidavit, an informant saw marijuana on the premises 5 days before issuance of the search warrant); *State v. Welsh*, 371 So. 2d 1314 (La. 1979) (an informant observed red and white capsules, LSD tablets, and an undetermined amount of marijuana 4 days before issuance of the search warrant); *State v. Iverson*, 364 N.W.2d 518 (S.D. 1985) (the informant saw a controlled substance in defendant's apartment 3 days before issuance of the warrant); *State v. Bruno*, 427 So. 2d 1174 (La. 1983) (informant's observations 4 days before issuance of the warrant, which was executed 7 days later, pertained to ongoing activity in controlled substances); and *State v. Yaritz*, 287 N.W.2d 13 (Minn. 1979) (6-day interval was permissible when the search warrant affidavit indicated continual sales of controlled substances).

Courts have had little difficulty with probable cause regarding an observation or information concerning a weapon or other articles and instruments used for commission of a crime. *United States v. Steeves*, 525 F.2d 33 (8th Cir. 1975), involved a search warrant for clothing, a ski mask, a handgun and a moneybag, all of which were sought as evidence pertaining to a bank robbery which had occurred 3 months earlier. The court stated in *Steeves*:

> Obviously, a highly incriminating or consumable item of personal property is less likely to remain in one place as long as an item of property which is not consumable or

> which is innocuous in itself or not particularly incriminating. . . .
>
> Let it be assumed for purposes of discussion that the defendant in fact robbed the bank on June 22 and that he immediately repaired to his home with his loot and its container, his weapon and his disguise. We think that it may be conceded to the defendant that as late as September 17 there was little reason to believe that any of the bank's money or the money bag would still be in the home. But, the same concession cannot be made with respect to the revolver, the ski mask, and the clothing. The ski mask and the clothes were not incriminating in themselves, and apart from his prior felony record possession of the pistol was not unlawful in itself or particularly incriminating. Moreover, people who own pistols generally keep them at home or on their persons.

United States v. Steeves, supra at 38. Other courts have reached a conclusion similar to that in *Steeves* concerning existence of probable cause; for instance, *United States v. Gann*, 732 F.2d 714 (9th Cir. 1984) (observations some 3 weeks before issuance of a search warrant were not too far removed for issuance of a search warrant concerning clothes worn and weapons used in a robbery); *Bastida v. Henderson*, 487 F.2d 860 (5th Cir. 1973) (observations 10 days before issuance of the search warrant for firearms used in a robbery); *Blount v. State*, 511 A.2d 1030 (Del. 1986) (observations 10 days before issuance of a search warrant for clothing and a firearm used for a homicide); *Jensen v. State*, 482 A.2d 105 (Del. 1984) (observations 27 days before issuance of the warrant for clothing and a firearm associated with a sexual assault); and *State v. Friel*, 508 A.2d 123 (Me. 1986) (observations 13 days before issuance of the search warrant for a firearm).

The district court's overruling Groves' motion to suppress was not clearly erroneous under the circumstances. Admittedly, the question whether probable cause existed to search for methamphetamine is rather close, when one considers the relatively small quantity of methamphetamine observed by the informant and mentioned in the officer's affidavit. However, the interval between issuance of the warrant and its execution is

insufficient to compel the conclusion that the information which was the basis for issuance of the search warrant had become stale and, therefore, negated existence of probable cause when the warrant was executed. Moreover, probable cause existed to search for the sawed-off shotgun because police officers had a reasonable belief that the shotgun was still in the residence 9 days after the search warrant was issued. See, *U.S. v. Williams*, 897 F.2d 1034 (10th Cir. 1990) (information, as a basis for the search warrant, was not so stale as to render officers' reliance on the warrant unreasonable); *State v. One 1987 Toyota Pickup*, 233 Neb. 670, 447 N.W.2d 243 (1989) (although the search warrant affidavit contained illegally obtained information, the search warrant was valid because the affidavit also contained lawfully obtained information which, considered alone, established probable cause). See, also, *State v. Guilbeault*, 214 Neb. 904, 336 N.W.2d 593 (1983); *State v. Welsh*, 214 Neb. 60, 332 N.W.2d 685 (1983). Accordingly, police conducted a valid search of the residence where Groves was staying; therefore, the contraband discovered pursuant to that search was admissible in Grove's trial. Thus, the district court was not clearly erroneous in overruling Groves' suppression motion.

Although the majority correctly affirms Groves' convictions, application of § 29-815 as a per se rule for subsistence of probable cause concerning a search warrant executed within the statutorily allowed 10-day period is clearly contrary to the U.S. Supreme Court's instruction that a constitutional question regarding "staleness" of information used for probable cause "must be determined by the circumstances of each case." *Sgro v. United States*, 287 U.S. 206, 211, 53 S. Ct. 138, 77 L. Ed. 260 (1932). Therefore, adoption of a per se statutory rule for determining reasonableness in execution of a search warrant is constitutionally unsound and results in the unconstitutional relinquishment of judicial authority and responsibility to examine and determine whether probable cause existed for execution of a search warrant.

CAPORALE, J., joins in this concurrence.

GARY A. KEITHLEY, APPELLANT, V. CHARLES J. BLACK ET AL., APPELLEES.

477 N.W.2d 806

Filed December 20, 1991. No. 89-331.

1. **Appeal and Error.** The purpose of an appellant's reply brief is to respond to the arguments the appellee has advanced against the errors assigned in appellant's initial brief; errors not assigned in an appellant's initial brief are waived and may not be asserted for the first time in a reply brief.
2. **Pleadings: Time.** Generally, the granting or withholding of permission to file a late pleading rests in the discretion of the trial court.
3. **Judgments: Demurrer: Appeal and Error.** Since a correct result will not be set aside merely because it is based upon reasons which may be incorrect, an order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken, even though the ground on which the ruling is based is not well taken or the order is general and does not indicate the ground on which it is based.
4. **Motions for Continuance.** A motion for continuance is addressed to the discretion of the trial court.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Affirmed.

Gary A. Keithley, pro se.

Robert M. Spire, Attorney General, and Lynn A. Melson for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Plaintiff-appellant, Gary A. Keithley, asserts defendants-appellees, Charles J. Black, John P. Eggers, and one Officer Bittinger, acting jointly and while employees of the state, negligently failed to prevent the theft of Keithley's property from his prison cell. Defendants demurred on the grounds the petition is time barred and contains a defect in parties. The district court sustained the demurrer and dismissed the suit. In his initial brief, Keithley assigned as operative errors the district court's (1) permitting defendants to demur out of time, (2) failing to state the ground on which it sustained the demurrer, and (3) failing to conduct a purportedly scheduled trial. Keithley attempted to assign additional substantive errors in his

reply brief; however, the purpose of an appellant's reply brief is to respond to the arguments the appellee has advanced against the errors assigned in appellant's initial brief. Thus, errors not assigned in an appellant's initial brief are waived and may not be asserted for the first time in a reply brief. See *De Lair v. De Lair*, 146 Neb. 771, 21 N.W.2d 498 (1946). Keithley's additional claim that the State's brief does not conform to the requirements of our rules is simply wrong. The record failing to sustain Keithley's operative assignments of error, we affirm.

Keithley filed his petition on April 21, 1988, but did not file a praecipe seeking issuance of summonses until December 7 of that year. Although the record does not tell us when the summonses were served, it does tell us that they were not signed and sealed by the deputy clerk of the district court until December 8, 1988. In the meantime, on November 22, the district court had issued an order directing Keithley to show cause on or before December 22 why the case ought not be dismissed for want of prosecution. The case was dismissed on December 28, 1988, and reinstated on January 11, 1989. On February 7, 1989, defendants sought leave to answer Keithley's petition out of time, which was granted. Defendants then demurred on February 22, 1989, within the time allotted.

Keithley's first operative assignment of error is without legal support. The general rule is that the granting or withholding of permission to file a late pleading rests in the discretion of the trial court. See, *W & K Farms v. Hi-Line Farms*, 226 Neb. 895, 416 N.W.2d 10 (1987), *on subsequent appeal*, *W & K Farms v. Walter*, 235 Neb. 952, 458 N.W.2d 230 (1990); *Anest v. Chester B. Brown Co.*, 169 Neb. 330, 99 N.W.2d 615 (1959); Neb. Rev. Stat. § 25-822 (Reissue 1989). Given Keithley's delay in requesting the issuance of summonses and the temporary dismissal of his suit, it cannot be said the district court abused its discretion in permitting defendants to demur out of time.

The second operative assignment of error is equally meritless. Since a correct result will not be set aside merely because it is based upon reasons which may be incorrect, *Logan Ranch v. Farm Credit Bank*, 238 Neb. 814, 472 N.W.2d 704 (1991), an order sustaining a demurrer will be affirmed if any one of the grounds on which it was asserted is well taken, even

though the ground on which the ruling is based is not well taken or the order is general and does not indicate the ground on which it is based, *Harmon Care Centers v. Knight*, 215 Neb. 779, 340 N.W.2d 872 (1983), and *Morse v. Mayberry*, 183 Neb. 89, 157 N.W.2d 881 (1968).

Nor does the law support the third and final operative assignment of error. The record reflects only that on February 6, 1989, Keithley filed a "Notice of Hearing" which recites that "trial . . . will be called for a telephonic hearing . . . at 11:00 am, Feburary [sic] 7, 1989, or as soon thereafter as this matter may be heard." While Keithley contends that this was the trial date assigned by the district court, there is nothing in the record which supports the claim. Even if that was the case, however, it was within the trial court's discretion to postpone any previously scheduled trial. See *In re Interest of M.*, 215 Neb. 383, 338 N.W.2d 764 (1983) (motion for continuance addressed to discretion of trial court).

AFFIRMED.

FORREST BOOKER, APPELLEE, V. NEBRASKA STATE PATROL, APPELLANT.
477 N.W.2d 805

Filed December 20, 1991. No. 89-501.

1. **Motions for New Trial: Courts.** A motion for new trial may appropriately be filed only in a trial court.
2. **Motions for New Trial: Courts: Administrative Law: Appeal and Error.** It is improper to move for a new trial in a court which reviewed the decision of a lower court or administrative agency and thus functioned not as a trial court but as an intermediate court of appeals.
3. **Motions for New Trial: Courts: Time: Appeal and Error.** The filing of a motion for new trial in a court which functioned as an intermediate court of appeals does not stop the running of the time within which to perfect an appeal from the reviewing court.

Appeal from the District Court for Lancaster County: JEFFRE CHEUVRONT, Judge. Appeal dismissed.

Robert M. Spire, Attorney General, Frederick R. King, and, on brief, Douglas J. Peterson for appellant.

Allen L. Fugate for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

The Nebraska Equal Opportunity Commission found that, in violation of the Nebraska Fair Employment Practice Act, Neb. Rev. Stat. §§ 48-1101 et seq. (Reissues 1984 & 1988), the respondent-appellant, Nebraska State Patrol, discriminated against the complainant-appellee, Forrest Booker, by constructively discharging him from employment because of his physical disability. The commission thereupon ordered, among other things, that the patrol reinstate Booker to employment. The patrol then appealed to the district court, which, on March 23, 1989, affirmed the commission's order. The patrol next sought a new trial, which the district court denied on April 24, 1989. The patrol thereafter, on May 19, 1989, filed its notice of appeal to this court.

Booker correctly asserts this court lacks authority to consider the issues presented by the patrol's various assignments of error.

It is true that the patrol filed its notice of appeal within 30 days of the district court's order overruling the patrol's request for a new trial, as contemplated by Neb. Rev. Stat. § 25-1912 (Reissue 1989). However, we have held that a motion for new trial may appropriately be filed only in a trial court. See *Interstate Printing Co. v. Department of Revenue*, 236 Neb. 110, 459 N.W.2d 519 (1990). It is improper to move for a new trial in a court which reviewed the decision of a lower court or administrative agency and thus functioned not as a trial court but as an intermediate court of appeals. See *Interstate Printing Co., supra*. It necessarily follows then that the filing of a motion for new trial in a court which functioned as an intermediate court of appeals does not stop the running of the time within which to perfect an appeal from the reviewing court. *Id.*

The patrol had 30 days from the entry of the district court's affirmance of the commission's order within which to file its notice of appeal to this court. See § 25-1912. The patrol having failed to meet this deadline, we acquire no jurisdiction to do anything other than dismiss the appeal. See, *Williams v. Gering Pub. Schools*, 236 Neb. 722, 463 N.W.2d 799 (1990); *Giangrasso v. Eagle Distributing Co.*, 185 Neb. 406, 176 N.W.2d 16 (1970).

APPEAL DISMISSED.

CAROL J. STROHMYER, APPELLEE, V. EDDIE L. STROHMYER, APPELLANT.
477 N.W.2d 584

Filed December 20, 1991. No. 89-664.

Appeal from the District Court for Dawson County: JOHN P. MURPHY, Judge. Affirmed.

Hal W. Anderson, of Berry, Anderson, Creager & Wittstruck, P.C., for appellant.

Leonard P. Vyhnalek for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

This is an appeal in a proceeding for the dissolution of a marriage. The trial court dissolved the marriage; divided the marital property; and awarded custody, child support, alimony, and attorney fees to the petitioner. The respondent appeals.

We have reviewed the record de novo, as we are required to do, and determine that the trial court did not abuse its discretion. See *Dinovo v. Dinovo*, 238 Neb. 285, 470 N.W.2d 174 (1991). The judgment is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JUDSON SACK, APPELLANT.

477 N.W.2d 921

Filed December 20, 1991. No. 90-747.

1. **Constitutional Law: Right to Counsel: Presumptions: Waiver.** The burden is on the State to establish a valid waiver of an accused's sixth amendment right to counsel, and every reasonable presumption against the waiver is indulged.
2. **Constitutional Law: Waiver: Records.** A waiver must appear affirmatively from the record before a court may conclude that an accused has waived a constitutional or statutory right.
3. **Constitutional Law: Right to Counsel.** Although an accused has the right to counsel, he or she also has a right under the sixth amendment and Neb. Const. art. I, § 11, to conduct his or her own defense.
4. **Right to Counsel: Waiver.** An accused may by express words or by conduct waive the right to counsel, so long as such is done voluntarily, understandingly, and intelligently, and so long as the accused is able and willing to abide by the rules of procedure and courtroom protocol.
5. **Right to Counsel.** An indigent accused does not have the right to appointed counsel of the accused's choice nor to be represented by an attorney the accused likes or with whom the accused has rapport.
6. **Right to Counsel: Waiver: Effectiveness of Counsel.** Once counsel has been appointed for an indigent accused, the accused must remain with the appointed counsel unless one of the following conditions is met: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and chooses to proceed pro se, (2) appointed counsel is incompetent, in which case new counsel is to be appointed, or (3) the accused chooses to retain private counsel.
7. **Right to Counsel: Motions for Continuance.** Retaining private counsel as a substitute for appointed counsel does not compel the granting of a continuance.
8. **Pleas: Right to Counsel: Waiver.** A plea of guilty cannot be said to have been entered freely, intelligently, voluntarily, and understandingly unless the accused either was represented by counsel or freely, voluntarily, and understandingly waived the right thereto.

Appeal from the District Court for York County: BRYCE BARTU, Judge. Reversed and remanded for further proceedings.

John R. Brogan for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ.

CAPORALE, J.

In accordance with his plea, defendant-appellant, Judson Sack, was adjudged guilty of second degree forgery, in violation of Neb. Rev. Stat. § 28-603 (Reissue 1989). He was thereafter sentenced to imprisonment for a period of not less than 6 nor more than 20 years. On appeal, he asserts the trial judge erred in, among other things, permitting the withdrawal of court-appointed counsel without appointing another and in finding the subsequent guilty plea to have been entered freely, voluntarily, and understandingly. Those claims being meritorious, we reverse, and remand the cause for further proceedings.

Prior to his arrest, Sack had lived in York at an apartment contained in a building owned by his grandfather, in which building the grandfather occupied a separate apartment. The relationship between the two had become strained even before Sack, on or about September 15, 1989, took the grandfather's automobile and, without the latter's consent, drove it to Lincoln, where he damaged it in an accident. According to the prosecutor, when Sack admitted to his grandfather the following day that he had taken the automobile, the grandfather told Sack to move out of his apartment. Sack, however, denies that the grandfather ordered him to leave.

On September 21, 1989, Sack, accompanied by two friends, Katrina Jackson and Erik Meyle, drove from Lincoln to York, arriving at around midnight. The three first went to the grandfather's apartment building, where they stayed for a few minutes before leaving to visit Jackson's aunt. After approximately an hour to an hour and a half, the three returned to Sack's former apartment, where Meyle and Jackson slept. When they awoke at 9 a.m. on September 22, 1989, they found that Sack's suitcase and belongings had been transferred to his grandfather's apartment.

Sack reported to York police officer Kim Christensen that he went to his grandfather's apartment around 7:30 on the morning of September 22, saw that the newspaper was gone from in front of the door, tried the door, and, finding it unlocked, let himself in. However, Berry Redfern, an employee of the York State Bank, where the grandfather served as board

chairman, told Christensen that Gloria Stett, a housekeeper who lived in the building and also worked at the bank, said Sack asked her to let him into the grandfather's apartment, but she would not open the door. Sack, on a different occasion, also told Christensen that during the evening of September 21, Stett had let Sack into his former apartment. Consequently, it is unclear how Sack got into either his former apartment or his grandfather's.

In any event, at some time on September 22, Sack invited Meyle and Jackson to his grandfather's apartment, where they ate and watched television and where Jackson took a shower. At approximately 10:30 a.m., the grandfather and Redfern arrived, and after an exchange of words between the grandfather and Sack, the three were ordered out. Shortly thereafter, the police were notified of the incident.

After leaving the grandfather's apartment, Sack, Jackson, and Meyle traveled to Bradshaw, Nebraska, where Sack used a $100 bill to buy lunch for everyone. They then returned to York and went to a branch of the York bank, where Sack attempted to cash a check purportedly written by the grandfather to Sack in the sum of $3,700. The teller, being concerned about the large amount of the check, called the main office of the bank and talked to John Strong. Strong in turn contacted the grandfather, who stated that the check was forged and that Sack should be sent to the main office. Instead of going to the main office, however, Sack went to another branch office. That branch had already been warned by Strong that Sack might try to cash a check there, and, thus, when Sack presented the check, the teller contacted Strong. Sensing trouble, Sack attempted to get the check back, but was arrested shortly thereafter.

The grandfather later indicated that the $100 bill and the blank check, which was then completed by Sack, had been taken from the pocket of a coat which had been at the grandfather's apartment. The grandfather estimated that the money and check were taken sometime between 10:30 p.m. September 21, 1989, and 8 a.m. the following day.

On September 29, James Truell was appointed counsel for Sack because of the latter's indigent status. On November 1,

Truell filed notice that Sack would assert an insanity defense. Truell represented Sack at the subsequent arraignment held on November 7 and at a hearing on a discovery motion on December 5. On January 19, 1990, Truell filed a motion for continuance because Sack was "currently undergoing private psychological evaluation . . . ." On February 1, 1990, Truell filed a motion to withdraw, asserting Sack had been uncooperative and dissatisfied with the representation he was receiving and had expressly discharged Truell. At the February 13, 1990, hearing on that motion, Truell stated Sack felt that "the communication between us and the nature of my representation has been insufficient or does not meet his standards." Sack, however, stated he was not asking Truell to withdraw because of his incompetence but, rather, because

> I would like an opportunity to seek counsel on my own. I don't think that — Well, actually I have — I have a list prepared. I don't intend to make a show out of it. I just feel that there's been a number of issues that I'm concerned about and would like an opportunity to obtain counsel on my own. If unable to do that then I would — I would appreciate an opportunity to have someone else appointed.

The trial judge stated that Truell was a competent attorney whose abilities met the standard of the community and told Sack that "if I allow him to withdraw, then your only option would be to retain your own counsel. Because I will find that you elect to proceed pro se, that is without counsel, and will not make a substitute appointment." The trial judge then asked Sack if he still wanted Truell to withdraw. Sack responded that he wanted 7 days to "[f]ind out if I can obtain a counsel on my own. At that time I will know for sure. . . . [B]ut I think it might be a little imprudent to just let him go if — if there's going to be no other opportunity provided to seek court appointed." The trial judge then stated that if Sack believed Truell should be discharged, the employment of substitute counsel would not be a good reason for a continuance of the trial, scheduled for March 19, 1990. The trial judge concluded by saying that the matter would be continued for 7 days, "at which time if . . . Truell does not withdraw his motion to withdraw, then I will

grant his withdrawal and we will then proceed accordingly . . . ."

On March 2, 1990, long after the 7 days mentioned on February 13 had elapsed, the trial judge sustained Truell's motion to withdraw. In a communication filed March 13, 1990, Sack asked to see the trial judge about the "attorney issue" and requested the appointment of John Brogan as his attorney. The document went on to say that Sack, not wishing to run up a bill for his grandfather, would pay "full restitution for attorney fees."

On the scheduled trial date, March 19, 1990, a hearing was held on Sack's written motion for a continuance. Sack declared therein that he had no attorney and had no resources to employ one. In arguing the motion, however, he said that he had an attorney but that the attorney was booked up on the scheduled day of the trial and would represent Sack if a continuance were granted. Notwithstanding that Sack had been found indigent, had declared in his motion for continuance that he had no funds with which to employ counsel, and had earlier offered only to pay restitution of attorney fees, he now announced that if the court did not appoint Brogan, he would hire Brogan himself. Sack did not, however, advise the trial judge how he would manage this. The trial judge overruled Sack's motion for continuance and ordered the trial to proceed.

During the half-hour recess which followed, Sack and the prosecutor negotiated an agreement whereby Sack would plead guilty to forgery, and the State would dismiss the burglary charge it had lodged. The trial judge explained some rights of Sack and had Sack acknowledge he understood that by pleading guilty he would be waiving (1) the presumption that he is innocent, (2) the right to trial, (3) the right to subpoena witnesses, (4) the right to face his accusers, (5) the right to challenge any admissions, statements, or confessions as not being voluntarily given, and (6) the right to suppress evidence. Sack agreed to forfeit these rights, and confessed to committing forgery. Although the trial judge did not at this time discuss Sack's lack of counsel, he found

> beyond a reasonable doubt that [Sack] fully understands all of his statutory and constitutional rights, has made those — and waived those rights freely, voluntarily,

> knowingly, and intelligently, fully understanding the nature of the charge and the consequences of his plea, which the Court specifically finds is made freely, voluntarily, knowingly and intelligently . . . .

The fundamental issue presented by the first summarized assignment of error, which challenges the district court's sustainment of appointed counsel's motion to withdraw, without appointing a replacement attorney, is whether the record demonstrates that Sack, either by words or by conduct, knowingly, intelligently, and voluntarily waived his right to counsel.

We begin our analysis by recalling that the burden is on the State to establish a valid waiver of an accused's sixth amendment right to counsel, *Michigan v. Jackson*, 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986), and that every reasonable presumption against the waiver is indulged, *State v. Green*, 238 Neb. 328, 470 N.W.2d 736 (1991). A waiver must appear affirmatively from the record before a court may conclude that an accused has waived a constitutional or statutory right. *State v. Clear*, 236 Neb. 648, 463 N.W.2d 581 (1990).

Although an accused has the right to counsel, he or she also has a right under the sixth amendment, *State v. Green*, 236 Neb. 33, 458 N.W.2d 472 (1990), and Neb. Const. art. I, § 11, to conduct his or her own defense, *State v. Shepard, ante* p. 639, 477 N.W.2d 567 (1991). Thus, an accused may by express words waive the right to counsel, so long as such is done voluntarily, understandingly, and intelligently, and so long as the accused is able and willing to abide by the rules of procedure and courtroom protocol. *State v. Green*, 236 Neb. 33, 458 N.W.2d 472 (1990). See, also, *State v. Clark*, 216 Neb. 49, 342 N.W.2d 366 (1983). An accused may also waive the right to counsel by conduct. E.g., *State v. McCoy*, 228 Neb. 178, 421 N.W.2d 780 (1988) (accused's second request that appointed counsel be permitted to withdraw and protest of appointment of standby counsel waived right to counsel).

The facts in *State v. Moore*, 203 Neb. 94, 277 N.W.2d 554 (1979), are not unlike those now before us. Moore had been charged with refusing to submit to a blood, breath, or urine

test. He was arraigned and informed of his right to an attorney, but Moore told the trial court of his desire to retain his own attorney. Eight days before trial, Moore was arrested for violating parole. He testified that neither he nor his wife was successful in hiring an attorney. Moore appeared at trial without counsel, at which time the trial court inquired whether Moore had been informed of his right to counsel. Moore responded affirmatively. The trial court

> then asked whether [Moore] had talked to his lawyer and [Moore] responded: "I couldn't. I was in jail." The trial court then stated: "All right, but you knew you had a right to a lawyer.", and [Moore] responded: "Yes, yes, I knew." The [trial court] then announced that [it] would take judicial notice that the jail had a telephone and said: "Well, I guess you'll have to go on your own then . . . ."

Id. at 96, 277 N.W.2d at 556. Subsequently to being found guilty, Moore and his wife wrote several letters requesting counsel for the purpose of appeal. Not until 7 1/2 weeks after the trial was Moore's indigency acknowledged and counsel appointed.

> Although [Moore] had already affirmatively indicated his intention to exercise his constitutional right to counsel by retaining private counsel, the [trial] court interpreted [Moore's] appearance at trial without counsel as an affirmative, intelligent, and understanding waiver of his constitutional right to counsel simply because [Moore] had been advised of his right to counsel a month before. Under the circumstances here it was wholly unreasonable to assume that [Moore] had conclusively rejected an offer of counsel, much less that he had affirmatively waived his right to counsel.

Id. at 99, 277 N.W.2d at 557.

State v. Sondag, 214 Neb. 659, 335 N.W.2d 306 (1983), is instructive as well. Sondag had appeared at several preliminary hearings with privately retained counsel. When Sondag failed to appear at the scheduled arraignment, the trial court issued a capias and took under advisement counsel's motion to withdraw. Privately retained counsel and Sondag then appeared at a rescheduled arraignment. The trial court

conducted the hearing and then permitted privately retained counsel to withdraw. It also informed Sondag of his right to court-appointed counsel. Sondag acknowledged his right but stated that he planned to hire his own attorney. " 'I don't want a public defender and I don't feel I know enough about the law to defend myself.' " *Id.* at 660, 335 N.W.2d at 307. The trial court proceeded to warn Sondag that the trial was set for March 1, 1982, and that it would not be continued should Sondag appear without counsel. On the day of the scheduled trial, Sondag arrived without counsel before a different judge, who reminded Sondag that he had been informed of his right to counsel and of the date of trial, and that despite his failure to secure counsel, the case was to proceed. The judge further noted that Sondag had declined the original invitation to have court-appointed counsel. Sondag responded: " '[B]ut at that time I assumed that I would—I was going to be able to afford an attorney. It was an improper assumption on my behalf.' " *Id.* at 661, 335 N.W.2d at 307. Notwithstanding, the trial proceeded.

Relying on *Moore, supra*, we held that Sondag's mere intent to retain counsel and his ensuing appearance alone at the scheduled trial could not be interpreted as a waiver of his constitutional right to counsel.

Here, Sack made clear that while he was concerned about the quality of representation being provided by Truell, he did not desire to proceed without an attorney. After Truell was permitted to withdraw, Sack again indicated he wanted representation.

It is well settled that an indigent accused does not have the right to appointed counsel of his or her choice nor to be represented by an appointed attorney the accused likes or with whom the accused has rapport. See *State v. Ryan*, 233 Neb. 74, 444 N.W.2d 610 (1989). Once counsel has been appointed for an indigent accused, the accused must remain with the appointed counsel unless one of the following conditions is met: (1) The accused knowingly, voluntarily, and intelligently waives the right to counsel and chooses to proceed pro se, see *State v. McPhail*, 228 Neb. 117, 421 N.W.2d 443 (1988); (2) appointed counsel is incompetent, in which case new counsel is to be appointed, see *State v. Clark*, 216 Neb. 49, 342 N.W.2d 366

(1983); or (3) the accused chooses to retain private counsel, see *State v. Neal*, 231 Neb. 415, 436 N.W.2d 514 (1989). However, retaining private counsel does not compel the granting of a continuance. See *id.*

Sack said nothing nor took any action sufficient to satisfy any of these conditions to discharge his court-appointed counsel. He did not waive his right to counsel and elect to represent himself, nor did he unequivocally forfeit his then appointed counsel in pursuit of a private attorney. The trial court found that Truell was competent, and his motion to withdraw as appointed counsel should therefore have been overruled. Under the circumstances, Sack's statement that he did not wish to proceed pro se renders clearly wrong the trial court's finding that Sack freely, voluntarily, and understandingly waived his right to counsel.

A plea of guilty cannot be said to have been entered freely, intelligently, voluntarily, and understandingly unless the accused either was represented by counsel or freely, voluntarily, and understandingly waived the right thereto. See, *State v. Glover*, 236 Neb. 402, 461 N.W.2d 410 (1990); *State v. Irish*, 223 Neb. 814, 394 N.W.2d 879 (1986). It therefore necessarily follows that the trial court's finding that Sack's plea of guilty was entered freely, intelligently, voluntarily, and understandingly is likewise clearly wrong.

Accordingly, the judgment must be reversed and the cause remanded for further proceedings on both the forgery and burglary charges.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

GRANT, J., participating on briefs.

SUSAN JANE KROENKE, APPELLEE, V. GARY LOUIS KROENKE, ALSO KNOWN AS GARY LEWIS KROENKE, APPELLANT.
477 N.W.2d 583

Filed December 20, 1991. No. 91-126.

Appeal from the District Court for Dodge County: MARK J. FUHRMAN, Judge. Affirmed.

Michael F. Pistillo and Mark A. Steele, of Steier, Rogers & Pistillo, P.C., for appellant.

Lawrence H. Yost, of Yost, Schafersman, Yost, Lamme, Hillis & Mitchell, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

In modifying a previously entered dissolution of marriage decree, the trial court dissolved a provision for joint custody of the parties' children, granted the children's permanent custody to the petitioner mother with liberal visitation rights in the respondent father, and increased the father's obligation to pay child support. The respondent appeals.

The ultimate test in determining the appropriateness of an award involving custody of minor children is reasonableness, as determined by the facts of each case, and the trial court's determination normally will be affirmed in the absence of an abuse of discretion. *Pournazari v. Pournazari*, 236 Neb. 260, 460 N.W.2d 661 (1990).

We have reviewed the record de novo, as we are required to do under *Pournazari, supra*, and have determined that the trial court did not abuse its discretion in awarding permanent custody of the parties' minor children to their mother.

Modification of child support is controlled by the rules set forth in *Phelps v. Phelps*, *ante* p. 618, 619-20, 477 N.W.2d 552, 554-55 (1991):

> Modification of child support is an issue entrusted to the discretion of the trial court. Appellate review of such issues is de novo on the record, but absent an abuse of discretion by the trial court, its decision will be affirmed

on appeal. The de novo review is also qualified by the fact that when there is a conflict in the evidence, weight is given to the fact that the trial court saw and heard the witnesses and accepted one version of the facts as opposed to the other.

Although *Phelps v. Phelps, supra*, had not been decided by this court when the trial court entered its modification order in the case at bar, the trial judge did apply all of the principles which we later set forth in the *Phelps* case. Our de novo review of the record reveals that the trial court did not abuse its discretion in increasing the child support award in this case.

We have reviewed all of the alleged trial errors claimed by the respondent and find they are without merit. Therefore, the order of the trial court modifying the dissolution of marriage decree in this case is affirmed. The petitioner wife is allowed an attorney fee of $1,500 in this court.

AFFIRMED.

DOUGLAS M. PHIPPS, APPELLANT, V. MILTON G. WALDBAUM & CO., A CORPORATION, ET AL., DEFENDANTS AND THIRD-PARTY PLAINTIFFS, AND STATE OF NEBRASKA, SECOND INJURY FUND, THIRD-PARTY DEFENDANT, APPELLEES.

477 N.W.2d 919

Filed December 20, 1991. No. 91-346.

1. **Workers' Compensation: Proof.** A claimant has the burden to prove by a preponderance of the evidence that his employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act.
2. **Workers' Compensation.** Findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case.
3. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.

4. **Workers' Compensation: Appeal and Error.** Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Kathleen Koenig Rockey, of Domina & Copple, P.C., for appellant.

Jay L. Welch, of Rickerson, Welch & Kruger, for appellees corporation et al.

Don Stenberg, Attorney General, and John R. Thompson for appellee State.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

This is an appeal in a proceeding under the Workers' Compensation Act.

The plaintiff, Douglas M. Phipps, was injured in an accident on June 28, 1989, while employed by the defendant Milton G. Waldbaum & Co. The accident occurred when the plaintiff slipped and fell, causing a bucket of alkali to splash on his face and body. Fellow employees immediately flushed the plaintiff's right eye with water and took him for treatment to the Benthack Clinic in Wayne, Nebraska, where he was seen by a physician's assistant, Gary West, and by a Dr. Benthack. The plaintiff was then referred to an ophthalmologist in Sioux City, Iowa, Dr. Larry Zweben.

Dr. Zweben saw the plaintiff on June 29 and 30 and July 3, 1989. In spite of evidence of healing, the plaintiff continued to complain of blurred vision and other difficulties with his right eye. Dr. Zweben referred the plaintiff to an Omaha ophthalmologist, Dr. William Schlichtemeier, who examined the plaintiff on July 7. Dr. Schlichtemeier determined that the plaintiff's eye injury had healed and that the plaintiff could return to work on July 10. Dr. Schlichtemeier further expressed his opinion that the plaintiff was able to drive a car and did not need to wear a patch over his right eye.

On July 10, instead of returning to work, the plaintiff saw physician's assistant West at the Benthack Clinic in Wayne. At that time he complained of nausea, vomiting, pain in his lower back, and pain in his right eye. West instructed the plaintiff to return on July 14 for a followup visit for treatment of his headaches and nausea.

On July 14, 1989, the plaintiff, while still wearing an eye patch, requested that his 15-year-old brother drive him to his appointment in Wayne. Instead of taking the paved highway from Wakefield to Wayne, the plaintiff and his brother took old Highway 35, which is a gravel road. Approximately 3 miles out of Wakefield, the plaintiff's brother lost control of the vehicle, which resulted in an accident in which the plaintiff was severely injured.

All of the plaintiff's medical and hospital expenses in connection with the eye injury of June 28 have been paid, and he has been paid all compensation for temporary total disability to which he is entitled in regard to the June 28 eye injury. This action was brought to recover compensation for the injuries the plaintiff sustained in the automobile accident on July 14.

Following the hearing before a single judge of the compensation court, the plaintiff recovered an award. On rehearing, the compensation court found that the plaintiff had failed to prove that the accident of July 14 arose out of and in the course of his employment because the trip to Wayne was not necessitated by the injury to his eye on June 28 and was not intended to involve treatment for that injury.

The plaintiff has appealed to this court. The plaintiff's assignments of error contend that the compensation court erred in failing to award compensation to him for the injuries he sustained in the accident of July 14.

A claimant has the burden to prove by a preponderance of the evidence that his employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act. *Roan Eagle v. State*, 237 Neb. 961, 468 N.W.2d 382 (1991). The employee must establish the cause-and-effect relationship involving employment, an industrial injury, and disability. *Id.*

"Findings of fact made by the Nebraska Workers'

> Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case. [Citations omitted.] In testing the sufficiency of evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. [Citations omitted.] Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous. Regarding facts determined and findings made after rehearing in the Workers' Compensation Court, § 48-185 precludes the Supreme Court's substitution of its view of facts for that of the Workers' Compensation Court if the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court. [Citations omitted.] As the trier of fact, the Nebraska Workers' Compensation Court is the sole judge of the credibility of witnesses and the weight to be given testimony."

Roan Eagle v. State, supra at 962, 468 N.W.2d at 384 (quoting *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990)).

The record shows that the plaintiff suffers from a somatoform disorder which manifests itself in the form of gastric problems. The plaintiff has had this condition for several years.

The record further shows that the plaintiff's eye injury of June 28 had healed by July 14 and that he had been released to return to work on July 10. The record also shows that the plaintiff's eye injury was mild and would not cause nausea and vomiting. It was the opinion of physicians who had treated the plaintiff that his eye injury was not severe and that the eye injury alone would not have caused the plaintiff to suffer stomach problems.

Physician's assistant West testified that after he treated the plaintiff's eye injury on June 28 and referred the plaintiff to Dr. Zweben, he considered himself no longer involved in the care of the plaintiff's eye injury unless there was a referral back. West treated the plaintiff for headaches and nausea on July 10. When

West scheduled the plaintiff's followup appointment for July 14, he intended to check on the plaintiff's headaches and stomach problems.

The plaintiff argues that he is entitled to workers' compensation benefits because his injuries from the accident of July 14 were the result of an accident that occurred in the course of a trip to his doctor's office for treatment of the eye injury he sustained on June 28. We do not reach the issue of whether injuries suffered as a result of an accident in the course of a journey to a doctor's office occasioned by a compensable injury are also compensable because in this case it is clear that the plaintiff was not en route for treatment for a work-related injury when he was injured on July 14.

When the evidence in this case is viewed in the light most favorable to the defendants, it establishes that the trip to Wayne on July 14, 1989, was not necessary for and did not involve treatment of the plaintiff's injury to his eye. Furthermore, the plaintiff failed to prove that there was any connection between his eye injury of June 28, 1989, and the headaches and nausea for which he was seeking treatment on July 14, when the automobile accident occurred. The compensation court's finding that the plaintiff's accident and injuries of July 14 did not arise out of and in the course of his employment by the defendant company is supported by the record.

The judgment is affirmed.

AFFIRMED.

LORINDA LYNN ADCOCK, APPELLANT, V. KEVIN LYNN ADCOCK, APPELLEE.
477 N.W.2d 583

Filed December 20, 1991. No. 91-397.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

K.C. Engdahl, of Schmid, Mooney & Frederick, P.C., for appellant.

Jon S. Okun for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

The petitioner mother, Lorinda Lynn Adcock, appeals from the judgment of the district court which, in dissolving the marriage of the parties, awarded custody of the parties' minor child, Aaron Lynn Adcock, to the respondent father, Kevin Lynn Adcock, and ordered the mother to pay child support. Appellant's assignments of error relate solely to the issues of custody and child support.

As stated in *Knickrehm v. Knickrehm*, *ante* p. 290, 475 N.W.2d 908 (1991), "[t]he ultimate test in determining the appropriateness of an award involving custody of a minor child is reasonableness, as determined by the facts in each case, and the trial court's determination normally will be affirmed in the absence of an abuse of discretion." The same test is applicable in reviewing an award of child support. See *Helms v. Helms*, 234 Neb. 630, 452 N.W.2d 269 (1990).

We have reviewed the record de novo, as we are required to do, and determine that the trial court did not abuse its discretion. *Knickrehm v. Knickrehm, supra.*

AFFIRMED.

KAREN P. ISENBERGER, APPELLEE, V. DAVID M. ISENBERGER, APPELLANT.
477 N.W.2d 927

Filed December 27, 1991. No. 89-825.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed as modified.

Warren S. Zweiback and Peter J. Lorenz, of Zweiback, Hotz & Lamberty, P.C., for appellant.

Pamela Hogenson Govier, of Frost, Meyers, Guilfoyle & Govier, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

This is a dissolution action of a 25-year marriage in which the respondent husband has appealed. He assigns as error the trial court's actions in (1) not allowing respondent to withdraw his rest and adduce further testimony as to his expenses, (2) granting excessive alimony of $900 per month for 90 months, (3) dividing the assets of the parties, (4) ordering respondent to pay $800 on petitioner's attorney fees in the trial court, and (5) providing that the period of 90 months for the payment of alimony shall not begin until this appeal is disposed of and that during the appeal, respondent shall pay $900 per month as temporary alimony.

With regard to the first four assignments of error, we have reviewed the trial court's judgment de novo on the record, and we determine that the trial court did not abuse its discretion in refusing to allow respondent to withdraw his rest, in the determination of alimony, in the division of marital assets, or in the order as to attorney fees.

We do note, however, that while the trial court found that alimony should be paid for 90 months, the court's order did not limit payments to the 90-month period. The decree should be modified in that respect.

We further determine that the court abused its discretion in ordering that respondent's payment of alimony during the

appeal "shall be in the form of temporary alimony and shall not constitute a credit against the Respondent's final obligation to pay alimony." We reverse that order and direct that respondent's obligation to pay alimony begin on July 1, 1989, and continue for 90 months.

As so modified, the trial court's order is affirmed. Each party shall pay his or her own attorney fees on appeal.

AFFIRMED AS MODIFIED.

STATE OF NEBRASKA, APPELLEE, V. CHERYL SUMSTINE, APPELLANT.
478 N.W.2d 240

Filed December 27, 1991. No. 90-507.

1. **Speedy Trial.** The purpose of Nebraska's speedy trial act, Neb. Rev. Stat. §§ 29-1207 et seq. (Reissue 1989), sometimes called the "6-month rule," is protection of an accused from a criminal charge pending for an undue length of time.
2. _____. In addition to protecting the interests of a defendant, the speedy trial act protects the interests of society and of the government in obtaining prompt disposition of criminal charges.
3. _____. The primary burden is on the State to see that an accused is brought to trial within the time prescribed by the Nebraska speedy trial act.
4. **Speedy Trial: Time: Proof.** To avoid a defendant's absolute discharge from an offense charged, as dictated by Neb. Rev. Stat. § 29-1208 (Reissue 1989), the State, by a preponderance of evidence, must prove existence of a period of time which is authorized by Neb. Rev. Stat. § 29-1207(4) (Reissue 1989) to be excluded in computing the time for commencement of the defendant's trial in accordance with the Nebraska speedy trial act, or "6-month rule."
5. **Speedy Trial: Proof.** To obtain absolute discharge under Neb. Rev. Stat. § 29-1208 (Reissue 1989), a defendant is not required to show prejudice sustained as the result of failure to bring the defendant to trial within 6 months in accordance with the Nebraska speedy trial act.
6. **Speedy Trial: Time: Indictments and Informations.** While time chargeable against the State under the speedy trial act commences with the filing of an initial information against a defendant, the time chargeable to the State ceases, or is tolled, during the interval between the State's dismissal of the initial information and refiling of an information charging the defendant with the same crime alleged in the previous, but dismissed, information.

7. _____: _____: _____. When the State dismisses an information against a defendant and refiles another information charging the defendant with the same offense alleged in the previous information, the periods during which the informations are pending for the same offense shall be combined in determining the last day for commencement of trial under Nebraska's speedy trial act, subject to time excluded pursuant to Neb. Rev. Stat. § 29-1207(4) (Reissue 1989) in computing the date for trial.
8. **Speedy Trial: Time: Indictments and Informations: Lesser-Included Offenses.** When the State dismisses a criminal charge contained in an information against a defendant and subsequently files an information against the defendant which alleges (1) the same offense charged in the previously dismissed information, (2) an offense that includes the simultaneous commission of a lesser-included offense charged in the information previously dismissed by the State, or (3) commission of a crime that is a lesser-included offense of the crime charged in the previously dismissed information, time which elapses during pendency of the informations shall be charged against the State in determining the last day for commencement of a defendant's trial pursuant to the Nebraska speedy trial act. The preceding rule requiring combination of the periods during which informations are pending is subject to the provision for excludable time, in accordance with Neb. Rev. Stat. § 29-1207(4) (Reissue 1989) of the Nebraska speedy trial act.

Appeal from the District Court for Lancaster County: WILLIAM D. BLUE, Judge. Reversed and remanded with direction.

Dennis R. Keefe, Lancaster County Public Defender, and Michael D. Gooch for appellant.

Don Stenberg, Attorney General, and Linda L. Willard for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

A jury in the district court for Lancaster County convicted Cheryl Sumstine of first degree arson, a violation of Neb. Rev. Stat. § 28-502(1) (Reissue 1989), which is a Class II felony. Sumstine was sentenced to imprisonment.

In her two assignments of error, Sumstine contends, first, that her right to a speedy trial, required by Nebraska's speedy trial act, Neb. Rev. Stat. §§ 29-1207 et seq. (Reissue 1989), was violated and, second, that the evidence is insufficient to sustain her conviction.

BACKGROUND

Filed on June 26, 1989, an information charged Sumstine with second degree arson, a Class III felony, and alleged that Sumstine intentionally set fire to her apartment building at 837 G Street on April 29, 1989, a violation of Neb. Rev. Stat. § 28-503(1) (Reissue 1989): "A person commits arson in the second degree if he or she intentionally damages a building by starting a fire . . . ." After Sumstine's arraignment on June 28, 1989, at which her trial was scheduled for September 11, the State, on September 7, obtained the court's permission to endorse the information with the names of 3 witnesses in addition to the 29 witnesses already endorsed on the information and take depositions within 40 days, but apparently did not take those depositions. While the record fails to disclose the nature of the proposed amendment to the information, on October 18 the court authorized the State to file an amended information against Sumstine within 7 days, but the State did not file the amended information. However, on November 9, the prosecutor appeared before the court and, without explanation reflected in the record, dismissed the pending second degree arson charge against Sumstine.

On January 8, 1990, the State filed an information against Sumstine charging her with first degree arson, a violation of § 28-502(1), which states:

> A person commits arson in the first degree if he or she intentionally damages a building by starting a fire . . . when another person is present in the building at the time and either (a) the actor knows that fact, or (b) the circumstances are such as to render the presence of a person therein a reasonable probability.

The 1990 arson charge alleged that Sumstine set fire to her apartment building at 837 G Street on April 29, 1989, and, in accordance with § 28-502(1), contained the allegation concerning a person's presence in the building set afire.

At her arraignment on January 10, 1990, Sumstine pled not guilty to the first degree arson charge. Immediately before trial on April 9, Sumstine moved for dismissal of the pending arson charge against her and based her claim to dismissal on the State's failure to comply with the Nebraska speedy trial act and

bring her to trial within 6 months after the second degree arson information was filed in June 1989. Section 29-1207(1) of Nebraska's speedy trial act provides: "Every person indicted or informed against for any offense shall be brought to trial within six months, and such time shall be computed as provided in this section." Section 29-1207 thereafter sets forth the method of computing the 6-month period for commencement of trial after an information has been filed, including specified periods of time excludable for the computation and a catchall exclusion: "Other periods of delay not specifically enumerated herein [shall be excluded], but only if the court finds that they are for good cause." § 29-1207(4)(f). Section 29-1208 of the speedy trial act states: "If a defendant is not brought to trial before the running of the time for trial, as extended by excluded periods, he [or she] shall be entitled to his [or her] absolute discharge from the offense charged and for any other offense required by law to be joined with that offense."

In arguing her dismissal motion in the district court, Sumstine contended that the previous second degree arson charge in 1989 was a "lesser grade felony" included within the pending first degree arson charge in 1990; therefore, the time during which the second degree charge was pending should be "tacked" to the period of pendency for the first degree arson charge, resulting in expiration of 6 months without Sumstine's trial and entitling her to absolute discharge from the first degree arson charge. The doctrine of tacking allows joining or combining periods which have a nexus for continuity of time involved in separated events or actions, for example, tacking based on privity of estate for adverse possession of realty, see *Bryan v. Reifschneider*, 181 Neb. 787, 150 N.W.2d 900 (1967), and *Thomas v. Flynn*, 169 Neb. 458, 100 N.W.2d 37 (1959), and tacking in reference to an extension of authority for motor carrier routes under Public Service Commission jurisdiction, see *Nebraska State Railway Commission v. Seward Motor Freight, Inc.*, 188 Neb. 223, 196 N.W.2d 200 (1972).

In opposing Sumstine's dismissal motion, the State asserted that the two arson informations related to "two different cases" and that, in cases such as Sumstine's, the practice of a prosecutor's voluntarily dismissing and refiling charges was

"done all of the time and done in the past and will be done in the future." Responding further to Sumstine's motion, the prosecutor stated:

> I don't think there has been any prejudicial effect of any kind. I am not sure what the tactical advantage was by filing one or the other [charge against Sumstine]. It doesn't appear to me to make any particular difference at this particular time. Again, it has been done numerous times. There is no showing of any kind of prejudice, wrongful doing by the State in so doing and I just think that again it's ready to go to trial and the State is ready.

The district court overruled Sumstine's dismissal motion based on the speedy trial act. Sumstine was tried and convicted, and has appealed with the assignments of error previously mentioned.

SPEEDY TRIAL

Sumstine claims she should have been discharged from the arson charge, since she was not brought to trial within 6 months as required by the Nebraska speedy trial act, §§ 29-1207 to 29-1209. Since Sumstine did not raise the question of her constitutional right to a speedy trial, we consider only Sumstine's contention based on Nebraska's speedy trial act. See, *State v. Oldfield*, 236 Neb. 433, 461 N.W.2d 554 (1990) (the constitutional right to a speedy trial is distinct from the provisions for a speedy trial prescribed by the Nebraska speedy trial act); *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983).

"The purpose of Nebraska's speedy trial act, sometimes called the '6-month rule,' is protection of an accused from a criminal charge pending for an undue length of time." *State v. Lafler*, 225 Neb. 362, 367, 405 N.W.2d 576, 580 (1987). See, also, *State v. Schroder*, 218 Neb. 860, 359 N.W.2d 799 (1984). The Supreme Court of North Carolina, construing North Carolina's speedy trial act, observed in *State v. Marlow*, 310 N.C. 507, 515, 313 S.E.2d 532, 537 (1984):

> The basic purpose of the Speedy Trial Act is to provide for the efficient administration of justice, which, according to our legislature, is best effectuated through a prompt determination of a criminal defendant's guilt or

> innocence. The Act's delineation of specific time limits and exclusions serves as a guideline for processing cases, and thus provides a technical defense for criminal defendants.

In reference to the federal Speedy Trial Act of 1974, 18 U.S.C. §§ 3161 et seq. (1988), the court stated in *U.S. v. Cephas*, 937 F.2d 816, 819 (2d Cir. 1991): "[I]n addition to protecting the interests of a defendant . . . the speedy trial act [protects] the interests of society and of the government in obtaining prompt disposition of criminal charges."

Accordingly, referring to the Nebraska speedy trial act, we have stated:

> " 'To avoid a defendant's absolute discharge from an offense charged, as dictated by § 29-1208, the State, by a preponderance of evidence, must prove existence of a period of time which is authorized by § 29-1207(4) to be excluded in computing the time for commencement of the defendant's trial in accordance with the Nebraska speedy trial act, or "6-month rule." . . .' "

State v. Oldfield, supra at 441, 461 N.W.2d at 560. Accord, *State v. Vrtiska*, 227 Neb. 600, 418 N.W.2d 758 (1988); *State v. Lafler, supra*.

To obtain absolute discharge under § 29-1208, a defendant is not required to show prejudice sustained as the result of failure to bring the defendant to trial within 6 months in accordance with the Nebraska speedy trial act. *State v. Lafler, supra*.

The first information against Sumstine was filed on June 26, 1989; hence, the last day for commencement of Sumstine's trial on the first information was December 26, 1989. See *State v. Oldfield, supra* at 441, 461 N.W.2d at 560: Computation of the 6-month period is based on the " 'move forward 6 months, but then back up 1 day' rule expressed in [*State v. Jones*, 208 Neb. 641, 305 N.W.2d 355 (1981)]." Since the State dismissed the first information on November 9, 1989, and filed the second information against Sumstine on January 8, 1990, there was an interval of 59 days without any arson charge against Sumstine. Also, during pendency of the first information, the State was allowed 40 days to obtain depositions. Sumstine suggests, however, that "it is reasonable to assume that the defendant was

also granted the same 40 days to take depositions. Consequently, those 40 days would be chargeable against the defendant." Brief for appellant at 14. We accept Sumstine's suggestion and concession of reciprocity concerning time allowed for depositions and, for that reason and for the purpose of this appeal, acknowledge that Sumstine is also charged with the time allowed for depositions. See, *State v. Brown*, 214 Neb. 665, 335 N.W.2d 542 (1983) (time for discovery requested by a defendant may be excluded under § 29-1207(4) in computing the last day for trial under the speedy trial act); *State v. Fatica*, 214 Neb. 776, 336 N.W.2d 101 (1983) (reasonable time used to obtain a deposition requested by a defendant in preparation for trial is excluded in computing the last day permissible for commencement of trial pursuant to the speedy trial act). Hence, if tacking based on the pendency of informations is allowed for computation of the period within which a defendant must be brought to trial pursuant to the Nebraska speedy trial act, and if the State is not charged with the interval between dismissal of the first information and the filing of the second information, 99 days (40 days for depositions and the 59-day interval between the arson informations) are added to the date of December 26, 1989, in determining the last day for commencement of Sumstine's trial on the second arson information. Since the second information was filed on January 8, 1990, and, for present purposes, since we assume applicability of tacking in computing time charged to the State for commencement of Sumstine's trial, chargeable time against the State was revived on January 8, 1990, when prosecution of Sumstine was resumed on the arson charge. The date of January 8, 1990, itself is counted or included in the 99-day extension for commencement of Sumstine's trial, because, if tacking is applicable, all the time during which an arson information was pending against Sumstine, except the initial filing day of June 26, 1989, must be used to determine the last day for commencement of Sumstine's trial in the absence of any excludable time concerning the computation. Therefore, extending the date of December 26, 1989 (the last day for trial under the first arson information), by 99 days (the interval during which no arson information was pending against

Sumstine plus the time for depositions, which is excluded pursuant to § 29-1207(4)), the last day for commencement of Sumstine's trial was April 4, 1990. Sumstine's trial started on April 9, 1990.

Thus, the all-important question in Sumstine's appeal is whether tacking based on the pendency of the informations is allowed in determining the last day for commencement of a defendant's trial pursuant to the Nebraska speedy trial act.

We implicitly approved tacking in *State v. Batiste*, 231 Neb. 481, 437 N.W.2d 125 (1989), wherein the information, filed on March 18, 1986, charged Batiste with first degree murder. On October 29, 1986, the State dismissed the information because a State's witness could not be located. On June 18, 1987, the State filed a first degree murder charge for the same homicide alleged in the previous information against Batiste, who, on October 1, 1987, moved for dismissal, claiming that her trial had not commenced within 6 months after the filing of the first information. In computing the 6-month period, the trial court concluded that only the time involved in the pendency of the murder informations was included in determining the last day for commencement of Batiste's trial. On the question about the speedy trial act presented in Batiste's appeal, we stated: "In Batiste's case, the time between the dismissal and refiling of the charge is not includable in calculating the 6-month time period set forth in § 29-1207 [Reissue 1989]." 231 Neb. at 485, 437 N.W.2d at 129. Thus, in *Batiste*, we recognized that, while time chargeable against the State under the speedy trial act commences with the filing of an initial information against a defendant, the time chargeable to the State ceases, or is tolled, during the interval between the State's dismissal of the initial information and refiling of an information charging the defendant with the same crime alleged in the previous, but dismissed, information. As a corollary of the preceding, and in accordance with *Batiste*, when the State dismisses an information against a defendant and refiles another information charging the defendant with the same offense alleged in the previous information, the periods during which the informations are pending for the same offense shall be combined in determining the last day for commencement of

trial under Nebraska's speedy trial act, subject to time excluded pursuant to § 29-1207(4) in computing the date for trial.

Similar to our conclusion in *Batiste, supra*, is the conclusion in *Cole v. State*, 650 S.W.2d 818 (Tex. Crim. App. 1983), wherein the Court of Criminal Appeals of Texas construed the Texas speedy trial act in relation to statutorily excluded time, i.e., the interval between the dismissed charge and a refiled charge based on the same transaction involved in the previous but dismissed charge, and stated: "It is reasonable to infer that by excluding the time between dismissal and the bringing of the new charge the time which elapsed under the first charging instrument is to be included in computation [of the last day for commencement of trial], and we so hold." 650 S.W.2d at 820. In *State v. Cuezze, Houston & Faltico*, 225 Kan. 274, 589 P.2d 626 (1979), the court recognized tacking in reference to the 180-day requirement for trial pursuant to the Kansas speedy trial act. Cuezze and Houston were charged in the initial information, which contained two counts of making a false writing and two counts of conspiracy. Cuezze was arraigned on June 13, 1977, and Houston on May 20, 1977. In September 1977, the State filed a second information against Cuezze, Houston, and Faltico, who was implicated by evidence obtained after the arraignments of Cuezze and Houston. When the second information was filed, the State dismissed the initial information against Houston and Cuezze, who were then arraigned on the second information on January 19 and 20, 1978, respectively. Since the Kansas speedy trial act required a trial within 180 days after a defendant's arraignment, the trial court dismissed the second information. In affirming the dismissal, the Kansas Supreme Court stated:

> [T]he purpose of [the Kansas speedy trial statute] is to implement and define the constitutional guarantee of a speedy trial and the statute establishes certain maximum time limits within which a defendant must be brought to trial. Absent a showing of necessity, the state cannot dismiss a criminal action and then refile the identical charges against the same defendant and avoid the time limitations mandated by the statute.

State v. Cuezze, Houston & Faltico, supra at 278, 589 P.2d at

630. See, also, *U.S. v. Leone*, 823 F.2d 246 (8th Cir. 1987) (when an indictment is dismissed on the government's motion, but the defendant is reindicted, the time limit for bringing a defendant to trial pursuant to the federal speedy trial act is tolled during the interval between indictments, but the time chargeable against the government is restarted when the second indictment is filed); *U.S. v. Fuesting*, 845 F.2d 664 (7th Cir. 1988) (time interval between government's dismissal of criminal complaint and return of indictment reinstating charges was excludable for the purposes of the federal speedy trial act, and the time limit for commencement of trial pursuant to the act was tolled during the interval; however, the time limit for commencement of trial began to run again when the charges were reinstated by indictment). Without tacking and the "tolling approach," the State, whenever a prosecutor desired a postponement of trial beyond the 6-month period specified in § 29-1207, could regularly evade the Nebraska speedy trial act as a result of the prosecutor's dismissing a charge, refiling the same charge, and acquiring a new 6-month period for commencement of a defendant's trial on the refiled charge. Thus, tacking and the tolling approach to a speedy trial act, that is, the State is not charged with the time during which no information is pending against a defendant, prevent undermining or subverting implementation of the speedy trial act by automatically providing prosecutors a new period in which to bring an accused to trial, irrespective of the time involved in the pendency of a prior proceeding dismissed by the State.

In light of the foregoing, we turn to Sumstine's case and consider the two charges filed against her, namely, the initial arson information filed in 1989 and the subsequent arson information filed in 1990. The initial information charged Sumstine with second degree arson in intentionally setting fire to her apartment building on April 29, 1989, a violation of § 28-503(1). The subsequent information charged Sumstine with intentionally setting fire to the same building described in the initial information and setting that fire on the same date alleged in the initial information. However, since the charge in the subsequent information was first degree arson, the second information contained the additional allegation that "another

person" was present in the apartment building when Sumstine allegedly set fire to the structure. See § 28-502(1). As far as the record reflects, all information concerning the arson charges was available to the State at the time the initial information was filed in 1989. Therefore, with the exception of the allegation concerning the presence of another person within the building set afire, both informations had the same allegation that Sumstine had intentionally set fire to her apartment building on the specific date mentioned in the informations. The identity of allegations for the arson offenses supplies a legal and rational nexus for the two informations against Sumstine. Moreover, in describing a lesser-included offense, we have stated: "To be a lesser-included offense, the elements of the lesser offense must be such that it is impossible to commit the greater offense without simultaneously committing the lesser offense." *State v. Olsan*, 231 Neb. 214, 219, 436 N.W.2d 128, 132 (1989). Consequently, the arson charged in the initial information was a lesser-included offense of arson charged in the subsequent information filed against Sumstine, since, under Nebraska law applicable in the present case, Sumstine, as charged by the informations, could not have committed first degree arson without simultaneously committing second degree arson.

The Supreme Court of Ohio, in *State v. Bonarrigo*, 62 Ohio St. 2d 7, 402 N.E.2d 530 (1980), construed Ohio's speedy trial act and its requirement of a trial within 270 days after the filing of a felony charge. In *Bonarrigo*, the state entered its *nolle prosequi* on a misdemeanor charge against Bonarrigo and later filed a felony charge against Bonarrigo, which was based on the same conduct charged in the misdemeanor case. Bonarrigo, by combining the time during which the felony and misdemeanor charges were pending, claimed he was entitled to dismissal of the felony charge. Agreeing with Bonarrigo, the court approved of computing the statutory time for commencement of a trial pursuant to the Ohio speedy trial act and refused to construe the act so that a prosecutor was provided with "a new 270-day period in which to bring an accused to trial, irrespective of the amount of unexplained delay involved in the prior misdemeanor proceedings," 62 Ohio St. 2d at 10, 402 N.E.2d at 534, and observed:

> The General Assembly has chosen to enforce the speedy trial statutes by providing an accused with a right to dismissal of charges upon timely motion, when not accorded trial within the statutory time. It was not the General Assembly's sole purpose in enacting the speedy trial statutes to reward those accused of criminal conduct for a prosecutor's lack of diligence. Concededly, an accused has a valid interest in, and an independent constitutional right to, a speedy trial. However, in construing the speedy trial statutes, this court also recognizes the public's interests not only in the prompt adjudication of criminal cases, but also in obtaining convictions of persons who have committed criminal offenses against the state.
>
> Consistent with these interests, we hold that, where a prosecutor obtains a felony indictment, based upon the same conduct as was a previously *nolled*, lesser-included misdemeanor charge, the time within which the accused shall be brought to trial pursuant to [the Ohio speedy trial act] consists of whatever residue remains from the 270-day period [required for trial in a felony case] after deducting the speedy trial time expended prior to the *nolle prosequi*. Such a holding adequately protects the accused's statutory rights.

62 Ohio St. 2d at 10-11, 402 N.E.2d at 534. Later, in *State v. Adams*, 43 Ohio St. 3d 67, 68, 538 N.E.2d 1025, 1027 (1989), the Supreme Court of Ohio, again construing Ohio's speedy trial act, concluded:

> "[W]hen new and additional charges arise from the same facts as did the original charge and the state knew of such facts at the time of the initial indictment, the time within which trial is to begin on the additional charge is subject to the same statutory limitations period that is applied to the original charge." [Quoting from *State v. Clay*, 9 Ohio App. 3d 216, 459 N.E.2d 609 (1983).]

Consistent with the legislative expression of policy in the Nebraska speedy trial act, see *State v. Lafler*, 225 Neb. 362, 405 N.W.2d 576 (1987) (prevention of a criminal charge pending against an accused for an undue length of time), we, therefore,

hold that when the State dismisses an information against a defendant and subsequently files an information against the defendant which alleges (1) the same offense charged in the previously dismissed information, (2) an offense committed simultaneously with a lesser-included offense charged in the information previously dismissed by the State, or (3) commission of a crime that is a lesser-included offense of the crime charged in the previously dismissed information, time which elapses during pendency of the informations shall be charged against the State in determining the last day for commencement of a defendant's trial pursuant to the Nebraska speedy trial act. The preceding rule requiring combination of the periods during which informations are pending is subject to the provision for excludable time in accordance with § 29-1207(4) of the Nebraska speedy trial act.

In Sumstine's case, as we have already noted, on the basis of tacking the last day for commencement of Sumstine's trial was April 4, 1990, in the absence of additional excludable time in computing the last day for commencement of trial. See § 29-1207. Since the State has not shown any excludable period, except the time utilized in Sumstine's obtaining depositions and the interval when Sumstine was not charged under any arson information, the State has failed to meet its burden and show that the speedy trial clock stopped at any time after restarting on January 8, 1990, when the State filed the second arson information against Sumstine. When the periods of pendency for the arson informations are tacked, or combined, it is clear that the State failed to bring Sumstine to trial within the 6-month period specified by § 29-1207. Sumstine is not required to prove prejudice to her as the result of the State's failure to comply with the speedy trial act; hence, Sumstine is entitled to absolute discharge on the arson charge, a result dictated by § 29-1208. Consequently, Sumstine's entitlement to absolute discharge requires that we reverse the district court's judgment and remand this cause with direction to enter judgment dismissing the arson information against Sumstine. Under the circumstances, it is unnecessary to consider Sumstine's second assignment of error concerning sufficiency of evidence to sustain her conviction.

Notwithstanding that the prosecutor informed the district court that the practice outlined in Sumstine's case is "done all of the time and done in the past," which may have been the situation, and further stated that such course of action "will be done in the future," our only comment is: "Not after today."

REVERSED AND REMANDED WITH DIRECTION.

STATE OF NEBRASKA, APPELLEE, V. OTIS WOODFORK, APPELLANT.

478 N.W.2d 248

Filed December 27, 1991. No. 90-784.

1. **Pleadings: Double Jeopardy: Final Orders: Appeal and Error.** The denial of a plea in bar raising a double jeopardy claim is a final, appealable order.
2. **Constitutional Law: Double Jeopardy: Lesser-Included Offenses.** To determine whether a subsequent prosecution is barred by the double jeopardy clause of the U.S. Constitution, a court must first determine if the offenses have identical statutory elements or if one is a lesser-included offense of the other, and if so, then the inquiry must cease and the subsequent prosecution is barred.
3. **Double Jeopardy: Statutes: Proof.** Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not.
4. **Constitutional Law: Double Jeopardy: Lesser-Included Offenses.** The fifth amendment to the U.S. Constitution forbids successive prosecution and cumulative punishment for a greater and a lesser-included offense.
5. **Constitutional Law: Double Jeopardy: Motor Vehicles: Convictions: Proof: Lesser-Included Offenses.** Willful reckless driving, Neb. Rev. Stat. § 39-669.03 (Reissue 1988), and operating a motor vehicle while intoxicated, Neb. Rev. Stat. § 39-669.07(1) (Cum. Supp. 1990), are not lesser-included offenses of operating a motor vehicle while the operator's license was revoked, § 39-669.07(5). Nor does proof of the conduct of operating a motor vehicle in a reckless manner or while intoxicated prove all of the elements of operating a motor vehicle while the operator's license was revoked so as to bar as violative of the double jeopardy clause of the U.S. Constitution a subsequent conviction for the latter offense.
6. **Case Disapproved: Constitutional Law: Double Jeopardy: Convictions: Proof.** The double jeopardy clause of the fifth amendment to the U.S. Constitution prohibits a subsequent prosecution where the State, in securing a conviction for one offense, *necessarily* has proved the conduct comprising *all* of the elements of

the subsequent offense not yet prosecuted, and to the extent that the holding of this court in *State v. Harrington*, 236 Neb. 500, 461 N.W.2d 752 (1990), is in conflict with this rule, it is expressly disapproved.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Scott C. Sladek for appellant.

James S. Jansen, Douglas County Attorney, and Robert C. Sigler for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Defendant, Otis Woodfork, appeals an order of the district court that overruled his motion to dismiss, which was in the nature of a plea in bar which he had filed in response to an information charging him with the Class IV felony offense of operating a motor vehicle while the operator's license was revoked. This charge arose out of the same incident which had previously resulted in no contest pleas and convictions in county court for the misdemeanor offenses of willful reckless driving and operating a motor vehicle while intoxicated (DWI). The basis for defendant's motion to dismiss/plea in bar was that prosecution on the felony charge was barred by the double jeopardy clause of the fifth amendment to the Constitution of the United States, and his sole assignment of error is that the district court should have sustained that motion/plea.

The denial of a plea in bar raising a double jeopardy claim is a final order as defined in Neb. Rev. Stat. § 25-1902 (Reissue 1989). *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990). Therefore, the appeal is properly before us.

It is Woodfork's contention that the driving incident which gave rise to his convictions of willful reckless driving and DWI was the same incident out of which the present felony charge of driving while his license was revoked arose. Therefore, he argues, a prosecution for this latter offense will require proof of conduct that constitutes the two offenses for which he has already been convicted. Finally, he states that under the rule of

Grady v. Corbin, ____ U.S. ____, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), and the decision of this court in *State v. Harrington*, 236 Neb. 500, 461 N.W.2d 752 (1990), the present prosecution violates his right to be free of double jeopardy. See, Neb. Const. art. I, § 12; U.S. Const. amend. V.

The U.S. Supreme Court stated in *Grady v. Corbin, supra* at 110 S. Ct. at 2090:

> To determine whether a subsequent prosecution is barred by the Double Jeopardy Clause, a court must first apply the traditional *Blockburger* test. If application of that test reveals that the offenses have identical statutory elements or that one is a lesser included offense of the other, then the inquiry must cease, and the subsequent prosecution is barred.

In *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), the Supreme Court adopted the following "test of identity" to determine whether crimes separately charged were actually but one offense:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

284 U.S. at 304.

In *Brown v. Ohio*, 432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977), the U.S. Supreme Court took note of the *Blockburger* test and stated, "Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense."

Applying this test to the case at hand, we conclude that willful reckless driving and DWI are not greater offenses to or lesser-included offenses of driving while the operator's license was revoked.

The willful reckless driving charge is based on Neb. Rev. Stat. § 39-669.03 (Reissue 1988), which states, "Any person who drives any motor vehicle in such a manner as to indicate a willful disregard for the safety of persons or property is guilty

of willful reckless driving."

In addition, defendant apparently pleaded no contest to a charge of DWI based on Neb. Rev. Stat. § 39-669.07(1) (Cum. Supp. 1990), which provides in part, "It shall be unlawful for any person to operate or be in actual physical control of any motor vehicle: (a) While under the influence of alcoholic liquor or of any drug."

In order to convict Woodfork of driving while his license was revoked based on § 39-669.07(5), the State must prove the following elements: "Any person operating a motor vehicle on the highways or streets of this state while his or her operator's license has been revoked pursuant to subdivision (2)(c) of this section shall be guilty of a Class IV felony."

One commits willful reckless driving by (1) driving a motor vehicle (2) in such a manner as to indicate a willful disregard (3) for the safety of persons or property. DWI is committed by (1) operation or physical control of a motor vehicle (2) while under the influence of alcohol. These offenses are definitely not greater offenses to or lesser-included offenses of driving while the operator's license was revoked, which requires (1) operating a motor vehicle on the highways or streets (2) with a license that has been revoked (3) pursuant to prior DWI convictions. It is clear that each offense requires proof of an additional fact.

Although defendant concedes that willful reckless driving and DWI are not lesser-included offenses of driving while the operator's license was revoked, he argues that a conviction of driving while the operator's license was revoked will require proof of conduct that constitutes an offense for which he has already been prosecuted. The conduct to which he refers is the driving or operation of a motor vehicle.

Woodfork bases his argument on the U.S. Supreme Court decision in *Grady v. Corbin*, ____ U.S. ____, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990). The defendant in *Grady* was involved in an automobile accident in which one person was killed. He received traffic citations charging him with driving while intoxicated and crossing the median, to which charges he pleaded guilty. Later he was indicted for criminally negligent homicide and third-degree reckless assault. The prosecution filed a bill of particulars which indicated the negligent and

reckless acts as (1) driving while intoxicated, (2) crossing the median, and (3) driving too fast for the weather and road conditions. The defendant moved to dismiss the indictment on double jeopardy grounds.

The U.S. Supreme Court agreed with the defendant that a subsequent prosecution for negligent homicide and third-degree reckless assault would violate the double jeopardy clause. The Court referred to *Harris v. Oklahoma*, 433 U.S. 682, 97 S. Ct. 2912, 53 L. Ed. 2d 1054 (1977), to demonstrate that a strict application of the *Blockburger* test is not the exclusive means of determining whether a subsequent prosecution violates the double jeopardy clause. In *Harris*, the state indicted and convicted the defendant of robbery with a firearm after he was first convicted of felony murder. The subsequent prosecution would have passed the *Blockburger* test, since the felony murder statute on its face did not require proof of a robbery to establish felony murder; other felonies could underlie a felony murder conviction. See *State v. Garza*, 236 Neb. 202, 459 N.W.2d 739 (1990). However, the *Harris* Court barred the subsequent robbery prosecution because the same robbery was used as the necessary felony. The *Grady* Court then proceeded to formulate a new test already suggested in *Illinois v. Vitale*, 447 U.S. 410, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980), which should be applied in case the subsequent prosecution survives the *Blockburger* test:

> [T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, *to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted*. This is not an "actual evidence" or "same evidence" test. The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. As we have held, the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding.

(Emphasis supplied.) *Grady v. Corbin, supra* at 110 S. Ct. at 2093.

Note that this rule seems to require that the *entire* conduct constituting the prior offense must be necessary to prove an element of the charged offense. In a footnote, the Court suggests this conclusion by stating the obvious corollary: "Similarly, if in the course of securing a conviction for one offense the State *necessarily* has proved the conduct comprising *all* of the elements of another offense not yet prosecuted (a 'component offense'), the Double Jeopardy Clause would bar subsequent prosecution of the component offense." (Emphasis supplied.) 110 S. Ct. at 2093 n.11.

The Court in *Grady* applied the analysis to the facts and concluded that the State had admitted by its own pleadings that "it will prove the entirety of the conduct for which Corbin was convicted—driving while intoxicated and failing to keep right of the median—to establish essential elements of the homicide and assault offenses." *Grady, supra* at 110 S. Ct. at 2094. However, the Court added that the prosecution would not have been barred "if the bill of particulars revealed that the State would not rely on proving the conduct for which Corbin had already been convicted (*i.e.*, if the State relied solely on Corbin's driving too fast in heavy rain to establish recklessness or negligence)." *Id.*

We adopted the *Grady* test in *State v. Harrington*, 236 Neb. 500, 503, 461 N.W.2d 752, 754 (1990), where we held that "[t]he issue is whether the State relied upon 'conduct' that constituted an offense for which the defendant had already been prosecuted to establish an essential element of the offense charged in this case." As will be pointed out later in this opinion, this was a misapplication of the *Grady* rule.

Applying the requirements of *Grady* to the case at issue, we conclude that a subsequent prosecution on the driving while the operator's license was revoked charge would not violate the analysis set out in that case. The test is whether the subsequent prosecution will require the State to prove the *entire* conduct for which the defendant has already been convicted. According to the complaint, the State intends to prove that Woodfork did "unlawfully operate a motor vehicle upon the streets and highways in said city, county, and state while his operator's license had been suspended, or revoked pursuant to Section

39-669.07 for life or for a period of 15 years . . . ." Woodfork has not been convicted of prior conduct comprising the entirety of that charge. The case would have been analogous to *Grady v. Corbin*, ____ U.S. ____, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), if the complaint had stated that Woodfork operated a vehicle upon the streets and highways in a reckless manner or while intoxicated. The word "unlawfully" in the complaint clearly refers to driving with a revoked or suspended license, since the statute does not require an additional unlawful act for a charge of driving while the operator's license was revoked. In other words, reckless behavior or a state of intoxication are not essential elements of a driving while the operator's license was revoked charge under § 39-669.07. Driving, on the other hand, is an essential element of the driving while the operator's license was revoked charge, but driving does not constitute an offense for which the defendant has already been prosecuted.

The fact that the prosecution might use evidence that while Woodfork was driving while his license was revoked, he was also intoxicated and reckless is not dispositive, since the U.S. Supreme Court does not follow the same evidence rule. The critical inquiry is what *conduct* the State will prove. Looking at the statute and the complaint, we determine it is clear that the only conduct the State intended to prove was driving while the defendant's license was revoked or suspended.

Woodfork also seems to claim that a subsequent prosecution on the driving while the operator's license was revoked charge is double jeopardy as to the willful reckless driving and DWI convictions, not because the offenses are identical or lesser included, but because they arose out of the same transaction. Woodfork bases his argument on the following language in *State v. Harrington, supra* at 503, 461 N.W.2d at 754: "In the *Grady* case, the court noted that prosecution for minor offenses and major offenses involving the same conduct may be permissible if all offenses are joined in one case. It is the proof of *conduct* for which the defendant has already been prosecuted that bars the subsequent prosecution."

Appellant seems to imply that the U.S. Supreme Court in *Grady v. Corbin, supra*, and thereby this court in *State v. Harrington, supra*, adopted the "same transaction" test set out

by Justice Brennan in his concurring opinion in *Ashe v. Swenson*, 397 U.S. 436, 453-54, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970): "In my view, the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." Stated differently, defendant implies that the U.S. Supreme Court and this court have held that "the same conduct" refers to the same act or transaction. It should be noted that Justice Brennan's same transaction test, although accepted in some states, has never been adopted by a majority of the U.S. Supreme Court. See *Brown v. Ohio*, 432 U.S. 161, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977) (*Ashe, supra*, was followed by *Brown*, wherein the Supreme Court embraced the *Blockburger* test). The *Blockburger* test was not rejected and replaced with the same transaction test in *Grady, supra*. The U.S. Supreme Court simply introduced the additional "proof of conduct" test, which should be applied when the subsequent prosecution passes the *Blockburger* test. *Grady, supra*, does not stand for the proposition that separate and distinct offenses arising out of the same act or transaction amount to the "same offense."

This state has never accepted the same transaction test either. Recently, this court repeated that "the rule that a person cannot twice be put in jeopardy for the same offense has no application where two separate and distinct crimes are committed by one and the same act, because the constitutional inhibition is directed to the identity of the offense and not to the act." *State v. Brown*, 235 Neb. 10, 12-13, 453 N.W.2d 576, 578 (1990).

The rationale for rejecting the same transaction test is well worded by a Florida court:

> The absurdity of the "same transaction" standard can be easily illustrated. Assume that one breaks and enters a building to commit larceny of an automobile, does thereafter in fact steal the automobile and drive away, killing the night watchman in the process, and two blocks away runs a red light which brings about his arrest by the municipal police. Could it be said with any logic that a plea of guilty to breaking and entering would bar a subsequent prosecution for murder? If so, presumably a

> plea of guilty to the traffic offense would likewise, since all arise from the "same transaction".

State v. Conrad, 243 So. 2d 174, 177 (Fla. App. 1971).

The subsequent prosecution on the driving while the operator's license was revoked charge passes the *Grady* test, since the State is not required to prove the *entire* conduct for which the defendant was convicted of willful reckless driving and DWI. There was no need for the State to prove conduct which constituted reckless behavior or a state of intoxication because neither conduct is an essential element of a driving while the operator's license was revoked charge under § 39-669.07. The only conduct which needs to be proven again in a subsequent proceeding, and which is mentioned in the State's complaint, is driving upon the streets and highways. Since driving in and of itself is not unlawful and does not constitute the entire conduct for which the defendant was previously convicted, a conviction of driving while the operator's license was revoked would not violate the double jeopardy clause. Woodfork's assignment of error is without merit.

However, we must now examine *State v. Harrington*, 236 Neb. 500, 461 N.W.2d 752 (1990). The *Grady* test, adopted by this court in *Harrington*, determined whether the State relied upon "proof of conduct" that constituted an offense for which the defendant had already been prosecuted to establish an essential element of the offense charged in the subsequent prosecution. However, as previously stated in this opinion, quoting from a footnote in *Grady v. Corbin*, ____ U.S. ____, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), it is the fact that the State *necessarily* has proved the conduct comprising *all* of the elements of the subsequent offense not yet prosecuted that bars the State, under the double jeopardy clause, from prosecuting that subsequent offense.

Thus, in summary, the State, because of the double jeopardy clause, cannot in the subsequent prosecution prove the *entirety* of the conduct for which the defendant has already been convicted to establish the essential elements of the offense charged in the subsequent prosecution.

The defendant in *Harrington* was convicted during his first

prosecution of discharging a projectile, in violation of the Omaha Municipal Code, which made it unlawful for any person to discharge an instrument which releases a projectile by means of an explosive charge. Omaha Mun. Code, ch. 20, art. VII, § 20-196 (1980). Thus, the elements of that offense are (1) a person discharges (2) an instrument (3) which releases a projectile (4) by means of an explosive charge.

In the subsequent prosecution, the defendant in *Harrington* was charged with being a felon in possession of a firearm with a barrel less than 18 inches in length, in violation of Neb. Rev. Stat. § 28-1206(1) (Reissue 1989). That section states in substance that any person who possesses any firearm with a barrel less than 18 inches in length and who has previously been convicted of a felony commits the offense of possession of a firearm by a felon. The elements of this offense are (1) a person who previously has been convicted of a felony (2) possesses (3) a firearm (4) which has a barrel less than 18 inches in length.

When we apply the *Blockburger* test, it is apparent that the sections are not identical and one offense is not a lesser-included offense of the other, because each provision requires proof of an additional fact.

It appears that the second prosecution also would not violate the additional *Grady* test. The essential issue in the case was whether in order to prove the element of possession necessary to convict the defendant of being a felon in possession of a firearm, the State relied upon conduct surrounding his conviction of the offense of discharging a projectile.

The conduct that was necessary to establish the violation of the city ordinance was that the defendant discharged a projectile. That conduct, discharging a projectile, although perhaps necessarily requiring temporary possession of a firearm to accomplish that act, was not a necessary element of the felony charge of being a felon in possession of a firearm. That latter charge required only proof of possession of a particular type of firearm and that the defendant be a convicted felon. In securing the conviction for the municipal code violation, the State did not *necessarily* prove the conduct comprising *all* of the elements of the felony offense of a felon in possession of a firearm.

Although the bill of exceptions in *Harrington* is no longer available, defense counsel in *Harrington*, in his brief, quoted from that record, indicating that the factual basis for both convictions was supplied by the reception into evidence of the police report of the incident.

Defense counsel in *Harrington* suggested that the U.S. Supreme Court and this court follow the same incident or same transaction test. Counsel argued that *Blockburger* stands for the proposition that the double jeopardy clause prohibits successive prosecutions for the same criminal act or transaction.

However, this is not true. The issue is not what evidence the State will introduce at trial, but what *conduct* the State will *prove*. The Nebraska Supreme Court especially stated that the *Grady* test is not an "actual evidence" or "same evidence" test. "The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. As we have held, the presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding." *Grady v. Corbin*, ____ U.S. ____, 110 S. Ct. 2084, 2093, 109 L. Ed. 2d 548 (1990). Thus, the fact that the State used the same police report in both prosecutions in *Harrington* does not make the second prosecution a violation of the double jeopardy clause.

The double jeopardy clause of the fifth amendment to the U.S. Constitution prohibits a subsequent prosecution where the State, in securing a conviction for one offense, *necessarily* has proved the conduct comprising *all* of the elements of the subsequent offense not yet prosecuted, and to the extent that the holding of this court in *State v. Harrington*, 236 Neb. 500, 461 N.W.2d 752 (1990), is in conflict with this rule, it is expressly disapproved.

The judgment of the district court is affirmed.

AFFIRMED.

WHITE, J., concurring.

I agree with the majority's treatment of the double jeopardy issue presented in this case and only write to emphasize the flaws which that analysis reveals in our separate lesser-included

offense doctrine.

The majority recognizes that the U.S. Supreme Court's decision in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), is the starting point for analysis of double jeopardy issues. In that case, the Supreme Court held that in determining whether the same act or transaction is punishable under more than one statutory provision, the test is "whether each provision requires proof of a fact which the other does not." *Blockburger, supra* at 284 U.S. at 304. As the majority also points out, in *Grady v. Corbin*, ____ U.S. ____, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), the Court held that the fifth amendment affords additional protection in the context of subsequent prosecutions involving the same act or transaction.

Nevertheless, it remains the case that application of the *Blockburger* test ordinarily determines whether cumulative punishments may be imposed for separate offenses arising out of the same act or transaction in a single prosecution. *Ohio v. Johnson*, 467 U.S. 493, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984). When two statutory provisions proscribe the "same offense" under the *Blockburger* test, there is a presumption that the imposition of punishment for both in a single prosecution is forbidden. *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed. 2d 535 (1983), quoting *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980). The application of the *Blockburger* test, moreover, clearly involves a strict comparison of statutory elements, rather than reliance on the actual evidence adduced at trial. See, *United States v. Woodward*, 469 U.S. 105, 105 S. Ct. 611, 83 L. Ed. 2d 518 (1985); *Illinois v. Vitale*, 447 U.S. 410, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980).

The determination of whether a person is being put in jeopardy more than once for the same offense in a single prosecution is closely related to the question of whether a lesser-included offense instruction is proper in a criminal case. Blair, *Constitutional Limitations on the Lesser Included Offense Doctrine*, 21 Am. Crim. L. Rev. 445 (1984). It is obviously desirable, then, to use the same test to resolve both issues. See *U.S. v. Schmuck*, 840 F.2d 384 (7th Cir. 1988). Given

the continuing vitality of the *Blockburger* test in the double jeopardy context, it would be logical to adopt a strict elements approach to the lesser-included offense doctrine as well. The U.S. Supreme Court recently did so for the federal courts in *Schmuck v. United States*, 489 U.S. 705, 109 S. Ct. 1443, 103 L. Ed. 2d 734 (1989). Therefore, I repeat the view expressed previously that this court should adopt a strict elements approach rather than the amorphous cognate-evidence approach for determining whether a lesser-included offense exists. See *State v. Garza*, 236 Neb. 202, 459 N.W.2d 739 (1990) (White, J., dissenting).

BOSLAUGH, J., dissenting.

In abandoning the interpretation of *Grady v. Corbin*, ____ U.S. ____, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), which this court adopted on November 2, 1990, in *State v. Harrington*, 236 Neb. 500, 461 N.W.2d 752 (1990), the majority appears to have accepted the position of the Wyoming Supreme Court in *Eatherton v. State*, 810 P.2d 93, 99 (Wyo. 1991), wherein that court stated, "The Supreme Court did not really develop any new law in *Grady* with respect to successive prosecutions." I find that concept hard to accept. Apparently the four dissenting members of the U.S. Supreme Court in *Grady* reached the same conclusion.

In Justice O'Connor's estimation, the decision rendered null the Court's very recent holding in *Dowling v. U.S.*, 493 U.S. 342, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990), that the collateral estoppel component of the double jeopardy clause did not bar in all circumstances the later use of evidence relating to prior alleged criminal conduct for which a defendant has been acquitted. See *Grady, supra* (O'Connor, J., dissenting).

The dissent written by Justice Scalia characterizes the decision as a departure "from clear text and clear precedent" and advises that "[t]he effects of this innovation upon our criminal-justice system are likely to be substantial." *Grady, supra* at 110 S. Ct. 2096. In particular, Justice Scalia believes that the practical effect of the decision "will come down to a requirement that where the charges arise from a ' "single criminal act, occurrence, episode, or transaction," ' they 'must

be tried in a single proceeding.' " 110 S. Ct. at 2102. In other words, the Court's decision "to extend the Double Jeopardy Clause to prosecutions that *prove* a previously prosecuted offense will lead predictably to extending it to prosecutions that *involve the same facts as* a previously prosecuted offense." (Emphasis in original.) 110 S. Ct. at 2104 (Scalia, J., dissenting).

If indeed the *Grady* Court "did not really develop any new law" with respect to successive prosecutions, then it would seem that the issues in this case could have been resolved under our decision in *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990).

The majority's analysis of the *Grady* case seems to ignore the Supreme Court's concern that "a technical comparison of the elements of the two offenses as required by *Blockburger* does not protect defendants sufficiently from the burdens of multiple trials." *Grady, supra* at 110 S. Ct. at 2093.

In Chief Justice Urbigkit's dissent in the *Eatherton* case, he noted that in another case since argued before the Wyoming court, the attorney general had suggested that "the United States Supreme Court opinion in *Grady* was 'difficult to understand', a 'muddled up piece of logic', 'confused' and perhaps questionable in future validity." *Eatherton, supra* at 104. Chief Justice Urbigkit then stated, "If that is the foundation upon which this decision is structured, it sits not even on sand but only on imagination. *Grady* was a constitutional case and is now controlling." *Id.*

The *Grady* case was decided on May 29, 1990. In a dissenting opinion to the denial of certiorari in *Parker v. Arkansas*, ____ U.S. ____, 111 S. Ct. 218, 112 L. Ed. 2d 186 (1990), filed on October 1, 1990, Justice Marshall suggests that the subsequent prosecution for " 'causing the death of two or more persons in a single criminal episode' " was barred under the *Grady* case by the prior prosecution for felony murder because in the second prosecution, "the State clearly reproved the *conduct* for which the petitioner was originally convicted — breaking into the Warrens' home and killing them — in order to establish essential elements of the offense of causing the death of two or more persons in a single criminal episode." (Emphasis in original.) 111 S. Ct. at 219 n.3.

The critical question in applying the *Grady* case is to determine what the U.S. Supreme Court meant by the term "conduct." Ordinarily, conduct refers to acts as distinguished from status. In the *Harrington* case, the first offense involved possession of and the discharging of a firearm. The only *conduct* involved in the second offense was the possession of the firearm. That was *conduct* for which the defendant had already been prosecuted.

CAPORALE, J., joins in this dissent.

IN RE INTEREST OF A.C., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. C.C. AND G.C., APPELLANTS AND CROSS-APPELLEES.

478 N.W.2d 1

Filed December 27, 1991. No. 91-322.

1. **Parental Rights: Appeal and Error.** In a parental rights termination case, our review is de novo on the record, and we are required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, we will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. _____: _____. The adjudication that a child is within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) is a final, appealable order.
3. **Appeal and Error.** Errors which are assigned but not argued will not be considered by this court.
4. **Parental Rights: Proof.** In order to terminate parental rights, it must be shown that termination of parental rights is in the child's best interests and that at least one of six bases provided in Neb. Rev. Stat. § 43-292 (Reissue 1988) exists.
5. **Parental Rights: Evidence.** A juvenile court may terminate all parental rights between the parents and a juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that the parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection.
6. **Parental Rights: Proof: Words and Phrases.** An order terminating parental rights must be based upon clear and convincing evidence. Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved.
7. **Parental Rights: Evidence: Proof.** A parent's natural right to the custody of his or her own child must yield when the two requirements of Neb. Rev. Stat. § 43-292 (Reissue 1988) have been met. First, there must be clear and convincing

evidence of the existence of one or more of the circumstances described in subsections (1) to (6) of § 43-292. Second, if one of the conditions prescribed in subsections (1) to (6) has been evidentially established, there must be an additional showing by clear and convincing evidence that termination of parental rights is in a child's best interests. It is a combination of the best interests of the child and evidence of fault or neglect on the part of the parent that is required.

8. **Parental Rights.** A plan for rehabilitation is not a prerequisite or condition precedent to termination of parental rights.

Appeal from the Separate Juvenile Court of Sarpy County: WILLIAM D. STALEY, Judge. Affirmed.

Susan Koenig-Cramer for appellants.

Michael D. Wellman, Sarpy County Attorney, and Lawrence D. Gendler for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

The adoptive parents of A.C., a 10-year-old female child, appeal the termination of their parental rights by the separate juvenile court of Sarpy County.

The juvenile court entered the termination order after finding (1) that the parents of the child "have substantially and continuously or repeatedly neglected said child and refused to give said child necessary care and protection" and (2) that it is in the best interests of the child for the parental rights to be terminated. We affirm.

We have held that in a parental rights termination case,

> "[o]ur review is de novo on the record, and we are required to reach a conclusion independent of the trial court's findings; however, where the evidence is in conflict, we will consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another."

In re Interest of B.M., ante p. 292, 475 N.W.2d 909, 910 (1991).

A.C., born October 29, 1980, is the adoptive daughter of appellants, C.C. and G.C., and the biological granddaughter of G.C.

In 1988, upon learning that A.C. had been sexually abused,

the family moved to Sarpy County from Turkey, where C.C. had been stationed in the military. In May of that year, A.C.'s increasingly inappropriate behavior prompted her parents to hospitalize her in Omaha for psychiatric treatment. At that time, she revealed to hospital personnel some details of abuse in the home. Upon her release from the hospital, A.C. was placed in foster care under the supervision of the Department of Social Services (DSS). The record is unclear as to how DSS initially became involved in A.C.'s case.

In June 1988, the State filed a petition which, as amended in August 1988, requested that the juvenile court take jurisdiction of A.C. under Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) because A.C. was a "juvenile who is homeless or destitute, or without proper support through no fault of his or her parent, guardian, or custodian . . . ." The parents stipulated to the facts alleged in the amended petition. Based upon the stipulated facts, the juvenile court took jurisdiction of A.C., pursuant to § 43-247(3)(a), and continued her custody with DSS for foster placement. The parents were ordered to cooperate with DSS.

DSS arranged therapy for A.C. and her parents. After two sessions with the therapist, the parents moved to Texas in early 1989 when C.C. retired with pension benefits from the military. A.C. remained in foster care in Nebraska. Thereafter, the parents made no effort to return to Nebraska until July 1990, when a supplemental petition to terminate parental rights was filed, despite a promise from C.C. that he and G.C. would return to Nebraska for monthly visitation with A.C. and for therapy. Although no written plan was ever adopted by the court, this promise was an informal agreement between C.C., his attorney, and DSS. The agreement that C.C. and G.C. would return to Nebraska for therapy was not mandated by the court, and the parents' failure to do so, in and of itself, is not a significant factor in terminating their parental rights in A.C. However, their failure to visit A.C. evidences their lack of interest in and neglect of the child.

A.C.'s parents' lack of interest in the well-being of their daughter was manifested in a number of other ways. There were five separate court hearings regarding A.C. from January 1989 to July 1990. None of those hearings was personally attended

by either parent. One hearing was attended by their counsel. Although three separate visits with A.C. were scheduled, both parents failed to appear at any of them. The parents stipulated that they misappropriated Social Security funds intended for A.C. The record reflects the amount misappropriated was $5,000. In Texas, the parents' phone was disconnected, and DSS had no contact with them for at least 5 months. DSS was unable to contact them by telephone. The evidence reflects A.C. told her therapist and hospital personnel that she had been sexually abused by her adoptive brother, who was also her biological cousin. He remains in the home of C.C. and G.C. A.C. continually expressed fear of returning to the care of her grandmother-adoptive mother.

A.C.'s parents requested that she receive psychiatric treatment in Texas. The recommendations of her therapist and of a Texas social worker who conducted a home study were that A.C. not be returned to her family in Texas. C.C. and G.C. adopted five children who were the natural children of G.C.'s three daughters. Four of the adopted children lived in Texas with C.C. and G.C.

On August 17, 1990, the State filed an amended supplemental petition, requesting that the parental rights of C.C. and G.C. to A.C. be terminated under Neb. Rev. Stat. § 43-292(2) and (6) (Reissue 1988). The petition alleged that "reasonable efforts, under the direction of the court, have failed to correct the conditions leading to the determination" that A.C. was a juvenile under § 43-247(3)(a). The amended supplemental petition also alleged that "[t]he parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection." See § 43-292(2).

Following an evidentiary hearing on January 24, 1991, attended by C.C. and G.C., their attorney, and A.C.'s guardian ad litem, the juvenile court found that there was clear and convincing evidence that A.C.'s adoptive parents had "substantially and continuously or repeatedly neglected [the juvenile] and refused to give [the juvenile] necessary care and protection . . . ." The juvenile court judge also found by clear and convincing evidence that it was in the best interests of A.C.

that C.C.'s and G.C.'s parental rights be terminated. The judge terminated them under § 43-292(2).

A.C.'s parents claim the juvenile court erred in finding that reasonable efforts, under the direction of the court, had failed to correct the conditions leading to the determination that the child was within the meaning of § 43-247(3)(a). That finding was made upon stipulated facts in the original petition, which was amended in August 1988. The adjudication that a child is within the meaning of § 43-247(3)(a) is a final, appealable order. *In re Interest of L.J., M.J., and K.J.*, 238 Neb. 712, 472 N.W.2d 205 (1991). No appeal was taken from that adjudication. Thus, the appeal of that adjudication is untimely and requires no further discussion. Two other assignments of error were not discussed in the appellants' brief. Errors which are assigned but not argued will not be considered by this court. *In re Interest of B.M., ante* p. 292, 475 N.W.2d 909 (1991).

The parents also assign as error the juvenile court's (1) finding that the parents had substantially and continuously or repeatedly neglected said child and refused to give said child necessary care and protection and (2) failure to consider the reasonableness of the plan, if any, of DSS, which plan failed to take into consideration the parents' geographic location.

In our de novo review of the record, we find that clear and convincing evidence supports the juvenile court's determination that parental rights should be terminated under § 43-292(2). In order to terminate parental rights, it must be shown that termination of parental rights is in the child's best interests and that at least one of six bases provided in § 43-292 exists. *In re Interest of C.P.*, 235 Neb. 276, 455 N.W.2d 138 (1990). Section 43-292 provides:

> [A juvenile court] may terminate all parental rights between the parents . . . and [a] juvenile when the court finds such action to be in the best interests of the juvenile and it appears by the evidence that one or more of the following conditions exist:
>
> . . . .
>
> (2) The parents have substantially and continuously or repeatedly neglected the juvenile and refused to give the juvenile necessary parental care and protection . . . .

An order terminating parental rights must be based upon clear and convincing evidence. Clear and convincing evidence means and is that amount of evidence which produces in the trier of fact a firm belief or conviction about the existence of a fact to be proved. *In re Interest of C.P., supra.*

> A parent's natural right to the custody of his or her own child must yield when the two requirements of Neb. Rev. Stat. § 43-292 (Reissue 1988) have been met. First, there must be clear and convincing evidence of the existence of one or more of the circumstances described in subsections (1) to (6) of § 43-292. Second, if one of the conditions prescribed in subsections (1) to (6) has been evidentially established, there must be an additional showing by clear and convincing evidence that termination of parental rights is in a child's best interests. It is a combination of the best interests of the child and evidence of fault or neglect on the part of the parent that is required.

In re Interest of N. W. and R. W., 238 Neb. 620, 630, 472 N.W.2d 887, 893 (1991).

The evidence of fault or neglect on the part of the parents has been set forth in the above facts. Those facts show clearly and convincingly that the parents substantially and continuously or repeatedly neglected A.C. and refused to give A.C. necessary parental care and protection. In fact, their conduct went beyond neglect of A.C. when they misappropriated $5,000 in Social Security funds which were intended for her benefit.

The evidence is also clear and convincing that termination of parental rights is in the best interests of A.C. A caseworker assigned to A.C. was asked why she believed it would be in the child's best interests to terminate parental rights in this case. She answered,

> [A.C.] has been living in foster care for several years now, she has grown into a very verbal child who is doing well in school, doing well in her children's groups such as Brownies and gymnastics, and she has consistently, since I've managed the case, not wanted to be with her grandparents.

Of particular significance is the testimony of A.C.'s therapist, a clinical psychologist, who opined that it was in

A.C.'s best interests that the adoptive parents' parental rights be terminated. The therapist testified that A.C.'s main fears are "[r]emolestation sexually by a family member, physical abuse from the grandmother. She also has an idea that her grandmother may try to kill her." The therapist diagnosed this then nine-year-old child as suffering from post-traumatic stress syndrome—a syndrome commonly associated with returning Vietnam veterans. A.C. was described by her therapist as a child of above-average intelligence whose behavior improved dramatically with therapy. The therapist testified that, in her opinion, if A.C. were returned to the family, "she'd decompensate psychologically [which] would mean going back to probably the worst of her symptoms thus far, probably compounded by the fact that she'd been abandoned by people that she trusted to keep her safe from that environment."

Similar testimony was given by another caseworker, who stated that after 2 years in foster care "[h]er behavior had stabilized to the point that, according to the foster mother, she only reacted negatively when she was afraid or when there was a discussion about her returning to her family . . . ."

Most disturbing is the continued presence in the family home of A.C.'s adoptive brother. A.C. has consistently maintained that this adolescent boy engaged in inappropriate sexual activity with her. The parents appear inexplicably indifferent to this fact, while for their daughter it remains "one of her main fears."

The requirements of § 43-292(2) having been met by clear and convincing evidence, appellants' first assignment of error is without merit.

The parents also allege error in the court's failure to consider the reasonableness of the plan, if any, of DSS. The essence of their argument is that DSS had no written plan for the family's reunification. This assignment of error is also without merit. A plan for rehabilitation is not a prerequisite or condition precedent to termination of parental rights. *In re Interest of A.H.*, 237 Neb. 797, 467 N.W.2d 682 (1991). A DSS caseworker testified it had been her hope that the parents would return to Nebraska for therapy and to work out a plan regarding visitation with A.C. The parents never returned for either of

those purposes.

Assigning as error the failure of the court to also adjudicate this matter under § 43-292(6), the State has cross-appealed. As we have found that parental rights were properly terminable under § 43-292(2), it is unnecessary for us to reach that issue.

The judgment of the trial court is correct and is affirmed.

AFFIRMED.

JOHN A. HELTER, APPELLANT, V. MARGARET E. WILLIAMSON, APPELLEE.

478 N.W.2d 6

Filed December 27, 1991. No. 91-371.

1. **Parent and Child: Presumptions: Proof: Evidence: Paternity.** The legitimacy of children born during wedlock is presumed, and this presumption may be rebutted by clear and convincing evidence. The testimony or declaration of a husband or wife is not competent to bastardize a child.
2. **Actions: Parties: Judgments.** Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests or without leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience.

Appeal from the District Court for Lancaster County: DONALD E. ENDACOTT, Judge. Reversed and remanded with directions.

Brian R. Watkins for appellant.

Beth Tallon, of Legal Services of Southeast Nebraska, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

Appellant, John A. Helter, alleges that he is the biological father of Kristopher Charles Williamson, born in Riverside, California, on October 18, 1988, to appellee, Margaret E.

Williamson. From the time of Kristopher's conception and birth through the present, Williamson has been married to Tracy Williamson.

Helter and Margaret Williamson cohabited for 7 months in California, commencing in December 1988, and separated in July 1989, because the family became homeless. Helter took Kristopher with him to his parents' home, and Margaret Williamson took her son from her marriage to Tracy Williamson with her to stay with a friend.

Shortly thereafter, Helter and Kristopher moved to Lincoln, where Helter had found employment. Margaret Williamson moved to Iowa to live with her parents. Helter took Kristopher to Iowa to see Margaret Williamson once, shortly after her arrival in Iowa. She did not assist in Kristopher's financial support; however, she testified to making several phone calls to Lincoln. She was unable to visit Kristopher again because she did not have access to a car, nor did she even possess a driver's license. A few months later, Margaret Williamson attempted to remove Kristopher while he was in the care of Helter's aunt.

The district court awarded Margaret Williamson custody of Kristopher, as well as ordering Helter to pay $75 per month in child support. Helter assigns the following errors: (1) that the judgment of the trial court is contrary to the evidence and facts adjudged at trial; (2) that the judgment of the trial court is contrary to the law relative to awarding custody of minor children born out of wedlock; (3) that the trial court erred in failing to make a factual finding of the fitness or unfitness of the appellant to be the custodial parent, as required by decisions of the Nebraska Supreme Court; (4) that the trial court erred in failing to state in its order reasons why the best interests of the child required a change of placement from appellant to appellee; and (5) that the trial court erred in changing custody of the minor child from the appellant to the appellee without a showing of a change in circumstances or compelling facts favoring a change of custody in the best interests of the minor child.

Due to our disposition of this matter, we do not address appellant's assignments of error, nor do we comment on the merits of his appeal.

A common tenet of both American and English common law is the premise that the legitimacy of children born during wedlock is presumed, and this presumption may be rebutted by clear and convincing evidence; the testimony or declaration of a husband or wife is not competent to bastardize a child. See, *Perkins v. Perkins*, 198 Neb. 401, 253 N.W.2d 42 (1977); *Ford v. Ford*, 191 Neb. 548, 216 N.W.2d 176 (1974); Neb. Rev. Stat. § 42-377 (Reissue 1988); *Goodright v. Moss*, 98 Eng. Rep. 1257, 2 Cowp. 591 (1777).

Although the parties do not dispute Kristopher's parentage, he is presumed to be an issue of appellee's marriage to Tracy Williamson absent clear and convincing evidence to the contrary. Notice of the proceedings and opportunity to appear must be served upon Tracy Williamson. We have held:

> " ' "Indispensable parties to a suit are those who not only have an interest in the subject matter of the controversy, but also have an interest of such a nature that a final decree cannot be made without affecting their interests, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience. . . ." ' "

Koch v. Koch, 226 Neb. 305, 312, 411 N.W.2d 319, 323 (1987).

We are cognizant of the fact that notice, the ensuing rehearing, and the inevitable delay in the resolution of this case will not aid in serving Kristopher's best interests.

However, the presumption that children born during the marriage are rebuttably deemed to be legitimate is a tenet of our common law that perseveres for reasons that are as sound today as they were in the 18th century. The presumption prevents nonparents from arriving on the scene, either during or after the marriage, and staking claims, parental visitation rights, and responsibilities without the knowledge or consent of the true parent.

The judgment is reversed and the cause remanded with directions to join Tracy Williamson as an indispensable party to this action.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. MARK D. PETERSEN, RESPONDENT.

478 N.W.2d 257

Filed December 27, 1991. No. 91-1183.

Original action. Judgment of disbarment.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

A disciplinary complaint was filed against Mark D. Petersen with the Counsel for Discipline of the Nebraska State Bar Association.

Pursuant to Neb. Ct. R. of Discipline 15 (rev. 1989), respondent filed a voluntary surrender of license with this court. The respondent freely and voluntarily waived all proceedings against him in connection with the disciplinary complaint. Respondent knowingly admitted that he had violated Canon I, DR 1-102(A)(1) and (4), of the Code of Professional Responsibility. He also freely and voluntarily consented to an order of disbarment and waived any right to notice, appearance, or hearing prior to entry of the order.

Accordingly, the respondent is hereby disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

NEBRASKA BUILDERS PRODUCTS CO., A CORPORATION, APPELLANT, V. THE INDUSTRIAL ERECTORS, INC., APPELLEE.

478 N.W.2d 257

Filed January 3, 1992. No. 89-368.

1. **Judgments: Appeal and Error.** In reviewing a judgment in a bench trial of a law action, the Supreme Court does not reweigh the evidence but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every

reasonable inference deducible from the evidence.

2. _____: _____. In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. However, when such judgment is not supported by the evidence, it is clearly wrong and must be set aside.
3. _____: _____. Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review.
4. **Uniform Commercial Code: Contracts: Sales: Appeal and Error.** If a contract involves both the sale of goods and services, and the parties have presented the case to the trial court and the Supreme Court on the theory that the sales article of the Uniform Commercial Code applies, the Supreme Court will dispose of the case on appeal on that theory.
5. **Uniform Commercial Code: Contracts: Sales: Parties: Intent.** A contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract. An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined. Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.
6. **Uniform Commercial Code: Contracts: Parties: Intent.** A contract may be found in the bargain of the parties by their language or by implication from other circumstances, such as course of dealings or usage of trade.
7. _____: _____: _____: _____. A contract does not fail for indefiniteness because a term is left open, as long as the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.
8. **Contracts.** An enforceable contract can be formed and still retain a condition to performance of that contract.
9. _____. A condition is excused if the occurrence of the condition is prevented by the party whose performance is subject to the condition.
10. **Uniform Commercial Code: Statute of Frauds: Contracts: Sales.** A writing may be sufficient to avoid the Neb. U.C.C. § 2-201 (Reissue 1980) statute of frauds if the writing evidences a contract for the sale of goods, is signed by the party against whom enforcement is sought, and specifies a quantity. The required writing need not contain all the material terms of the contract.
11. **Statute of Frauds: Contracts.** Several writings can be pieced together to satisfy the writing requirement of the statute of frauds, even though such writings taken alone would not have been sufficient.
12. **Statute of Frauds: Contracts: Sales.** Oral contracts may be enforced absent a writing if the party against whom enforcement is sought admits in his or her pleading, testimony, or otherwise in court that a contract for sale was made.
13. **Statute of Frauds: Contracts.** It is no longer possible to admit the execution of a contract in court and still treat the statute of frauds as a defense.
14. **Uniform Commercial Code: Statute of Frauds: Contracts.** Neb. U.C.C. § 2-201(3)(b) (Reissue 1980) contains three requirements: The statute of frauds is

not applicable if the contract is admitted; the admission must be made by the party against whom enforcement of the oral contract is sought; and the admission must be made in court.

15. **Uniform Commercial Code: Statute of Frauds: Contracts: Trial.** An admission within the meaning of Neb. U.C.C. § 2-201(3)(b) (Reissue 1980) can be made when the party denying the existence of the contract and relying on the statute takes the stand and, without admitting explicitly that a contract was made, testifies to facts which as a matter of law establish that a contract was formed.
16. _____: _____: _____: _____. A compelled or involuntary admission of the existence of an oral contract, obtained during cross-examination at trial, may be relied upon to satisfy Neb. U.C.C. § 2-201(3)(b) (Reissue 1980).
17. **Statute of Frauds: Contracts.** The statutory requirement of admission of a contract can be satisfied by way of pleadings, bills of particulars, depositions, affidavits, admissions pursuant to notices to admit, and oral testimony, including admissions made on cross-examination.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Reversed and remanded for further proceedings.

Thomas J. Culhane and Gary L. Hoffman, of Erickson & Sederstrom, P.C., for appellant.

Edward D. Hotz, of Zweiback, Hotz & Lamberty, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Appellant, Nebraska Builders Products Co. (Nebraska Builders), brought this action against the appellee, The Industrial Erectors, Inc. (Industrial), to recover the excess costs of substitute performance on an alleged purchase contract for cranes. Nebraska Builders appeals from a judgment of the trial court declaring that there was no enforceable contract between the parties but that, instead, the parties contemplated a written contract which was never executed. We reverse, and remand for further proceedings.

In reviewing a judgment in a bench trial of a law action, the Supreme Court does not reweigh the evidence but considers the evidence in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the

evidence. *Albee v. Maverick Media, Inc., ante* p. 60, 474 N.W.2d 238 (1991). In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous. *Id.* However, when such judgment is not supported by the evidence, it is clearly wrong and must be set aside. *Hammond v. Streeter*, 225 Neb. 491, 406 N.W.2d 633 (1987). Regarding a question of law, an appellate court has an obligation to reach a conclusion independent of that of the trial court in a judgment under review. *Knox v. Cook*, 233 Neb. 387, 446 N.W.2d 1 (1989).

The record reflects the following facts: In early 1985, the Omaha Public Power District (O.P.P.D.) invited bids for the construction of a service center near Elkhorn, Nebraska. William Hawkins, on behalf of Nebraska Builders, an Omaha-based company engaged in the business of selling construction products, obtained the plans and specifications which identified supplies, materials, and equipment to be used in the construction of the service center. Nebraska Builders intended to submit its bid as a subcontractor or material supplier to the companies bidding for the general contract for the construction of the service center later that year. Hawkins identified many items in the plans and specifications which Nebraska Builders could potentially supply for the project, including several types of crane systems. Previously, Nebraska Builders had purchased such cranes from Industrial. Industrial is a Chicago-based company which manufactures various types of cranes and also sells cranes manufactured by others.

Hawkins contacted Timothy Brennan, Industrial's sales manager, in February 1985, to inquire if Industrial was interested in submitting a bid on the cranes. Brennan traveled to Omaha on February 28, 1985, to review the plans and specifications for the crane systems. Brennan obtained the information necessary to prepare a bid, including Section 11520 of the specifications—Material Handling and Associated Equipment. The specifications were very detailed, specifying manufacturer, model number, electrical requirements, capacity, speed, control system, and other performance characteristics. Variance in equipment had to be approved in writing by the project engineer pursuant to a procedure set forth in the

specifications. Both Brennan and Hawkins were aware of this procedure.

On March 12 or 13, 1985, Brennan telephoned Hawkins and told him that Industrial would sell and install the crane systems as per specifications for a total sum of $449,920, which consisted of $399,935 for materials and $49,985 for installation. Brennan stated that there were some minor exceptions to the specifications, but those could be worked out with the O.P.P.D. engineer. Nebraska Builders submitted a bid based, in part, on Industrial's bid. On March 26, 1985, Brennan confirmed the telephone conversation with a letter to Hawkins stating Industrial's proposal.

By this letter, exhibit 14, Industrial "propose[d] to furnish all Crane Systems, Jib Cranes and Monorail Systems per Specification #11520 dated 2/26/85 including the three Addendums." Then followed a detailed listing of the specific items which Industrial agreed to furnish at a total material cost of $399,935, plus $49,985 if Industrial was to install the listed equipment.

William Hawkins contacted Hawkins Construction Company (Hawkins Construction), the general contractor with the lowest bid, to see if Nebraska Builders was the low bidder on any of the items Hawkins Construction had bid on. This conversation led to a period of negotiations between Industrial and Nebraska Builders. During the negotiations, Nebraska Builders put together a "package bid" and gave Hawkins Construction a lump-sum price on several items, including the cranes. Nebraska Builders alleges that upon its request Industrial reduced its bid twice. Industrial disputes the second reduction and argues that the bid was only once reduced, by $4,500. However, exhibit 46 consists of a series of adding machine tapes including notations admittedly made by Brennan of Industrial. These tapes indicate a second reduction of $26,937, with additions of $2,400 for each interlock device. As testified to by Hawkins, there were four interlock devices, and this total reduction was therefore $17,337.

At the time Nebraska Builders submitted its package bid to Hawkins Construction, William Hawkins had reviewed Industrial's proposal and knew that the items proposed were

different models made by different manufacturers than those called for in the specifications; however, the proposal stated that Industrial would furnish all crane systems as required by Section 11520 of O.P.P.D.'s specifications. Hawkins was also aware that any deviations needed specific approval. He was not concerned about the deviations, since O.P.P.D. was required to accept alternatives if they were of equal quality. Since Industrial was in the business of manufacturing and selling cranes and had stated that the proposal was per specifications and any deviations from the specifications were "minor," Hawkins believed that the cranes set forth in Industrial's proposal were of equal quality, and thus, approval of the deviations would not be a problem.

During early May, Hawkins was informed by Hawkins Construction that Nebraska Builders' bid on the crane systems, as well as on various other items, was accepted. Hawkins testified that he immediately telephoned Industrial to accept Industrial's offer. He does not remember whether he talked to Brennan or Jerry Cole, the president of Industrial. Brennan testified that he did not have that conversation with Hawkins. Cole did not testify at the trial.

Although Brennan denies his having the conversation in which Nebraska Builders accepted Industrial's bid, Industrial and Nebraska Builders exchanged correspondence concerning the variance approval and exceptions to the specifications between May 31 and August 9, 1985. In a letter dated May 31, 1985, Brennan assured Nebraska Builders that Industrial had adhered to all of O.P.P.D.'s specifications in preparing its bid and that all equipment "will be equal to or better than" the equipment specified in the plans and specifications. Brennan also sent a letter dated June 10, 1985, which starts as follows: "This letter is to confirm our telecon regarding the above subject." The above-named subject in the letter was "Jib Crane, Monorails and Crane Equipment." The letter states further that Industrial is "trying to alleviate the confusion of the materials that Industrial is supplying." Brennan went on to describe the cranes "to be furnished" and concluded by stating that he hoped "this letter will alleviate any confusion regarding the materials to be furnished and we look forward to working with

you on this project." The O.P.P.D. engineers for the district ultimately approved Twin City Monorail (Twin City) and Crane Manufacturing & Service Corporation, Industrial's subcontractors, as crane manufacturers.

During this same time period, Industrial repeatedly requested Nebraska Builders to issue a purchase order, written contract, or letter of intent. Nebraska Builders denied these requests, stating that a written contract would be forthcoming upon its signing a contract with Hawkins Construction. Nebraska Builders never provided Industrial with a written contract. Industrial, in turn, did not issue any written contract or purchase order to any of its suppliers and, in fact, told one supplier that a written purchase order could not be given until Industrial received one from Nebraska Builders.

Despite the fact that there was no written contract, Brennan visited Nebraska Builders' office on August 8, 1985, on behalf of Industrial. Industrial also prepared and submitted shop drawings showing the recommended foundation design and bolt locations for the various floor-mounted jib cranes included in Industrial's proposal.

Brennan sent Hawkins a letter dated July 23, 1985, to confirm a verbal conversation concerning a list of deviations from the specifications, which deviations, if changed to meet the specifications, would constitute an additional cost of an unspecified amount to Industrial's bid. Hawkins testified that he was confused when he received the letter because he had not spoken to Brennan about any deviations to the specifications other than when he got Industrial's oral bid in March 1985. Hawkins discussed the letter with Brennan during Brennan's trip to Omaha on August 8, 1985. Brennan stated that he had not included in Industrial's bid the hoists for the jib cranes and that he had forgotten to include the footwalks and handrails for the largest overhead crane. Hawkins told Brennan that he expected Industrial to supply everything called for in the specifications in accordance with its bid.

Brennan had prepared another letter, dated August 7, 1985, which purported to confirm a telephone conversation between Hawkins and Brennan. The letter informed Hawkins that in order to provide the cranes in accordance with the

specifications "with no exceptions" there would be an additional cost of $167,500 to the original quotation. Brennan testified that the letter was never sent to Hawkins. Brennan further stated that he could not recall the telephone conversation referred to in his letter to Hawkins.

In September 1985, Brennan told Hawkins that Twin City, the company from which Industrial was to purchase some of the cranes, did not want to furnish the cranes. According to Brennan, Twin City felt that the specifications had been drawn up for one manufacturer.

Hawkins became concerned that Industrial was not going to perform under the alleged contract. He telephoned Cole, Industrial's president, to discuss his concerns. Cole assured Hawkins that he would discuss the matter with Twin City and attempt to get it resolved. Brennan informed Hawkins sometime between October 7 and 9 that Twin City had taken several exceptions to the specifications and that as a result Twin City's price to Industrial was going to increase by more than $100,000.

Hawkins went to Chicago on October 14, 1985, to meet with Brennan and Cole to discuss Industrial's problem with Twin City. During the meeting, Brennan and Cole showed Hawkins a breakdown of the original bid and the new costs in view of Twin City's price increase. Hawkins was informed that strict compliance with the specifications would increase the original bid by approximately $150,000, which included extra costs for the jib crane hoists and Twin City's price increase. Hawkins told Industrial that a price increase was not possible. Brennan stated that Industrial would not perform without the price increase. Discussions between Industrial and Nebraska Builders terminated. Nebraska Builders claims to have obtained performance of the contract elsewhere at an additional cost of $136,136.11.

Industrial and Nebraska Builders had no written agreement regarding the time of performance, necessity or amount of a performance bond, time of payment, or whether Industrial would be bound by the terms and conditions of the general contract. However, some of these items were discussed in Industrial's proposal letter. Nebraska Builders and Industrial

contemplated entering into a written agreement which would have addressed such concerns. Hawkins testified that Nebraska Builders has a standard subcontract form which includes such terms as a complete description of work, approved variances, price, terms of payment, time of performance, performance bond, and adherence to the terms of the general contract.

The parties stipulated at trial that the dispute would be governed by the Uniform Commercial Code. Following a trial and submission to the court without a jury, judgment was entered in favor of Industrial.

In order for one to more clearly understand the issues in this case, it may be helpful to set forth that portion of the district court's order which contains its findings:

> The Court finds that no contract existed between Nebraska Builders Products and Industrial Erectors. The Court finds that the parties had negotiated to enter into an agreement at a later time which would include among other items the delivery dates, payment schedules and specific waivers of general contractor's written requirements and specifications. In fact, each of the parties contemplated a written contract which was never entered. Fleming Co. of Nebraska v. Michals, 230 NW 2d 753 [sic] (1988), Nebraska Seed Co. v. Harsh, 98 Neb. 89, 154 [sic] NW 310 (1915). A contract was not present in this case as a matter of law and facts.

Nebraska Builders' five assignments of error can be summarized as follows: (1) The decision of the trial court is not supported by the evidence and is contrary to law; (2) the trial court erred in deciding there was no enforceable contract because the parties intended to execute a written contract at some point in the future; and (3) the trial court misapplied the Nebraska U.C.C. in its determination that no valid enforceable contract existed between Nebraska Builders and Industrial in that there was no agreement on incidental terms.

Since the parties stipulated at trial that the U.C.C. governed the dispute, this court will presume that the U.C.C. controls the case. Because of its citation to *Michals* and *Harsh* in its order, it is quite apparent that the trial court decided this case on common-law grounds and not under the U.C.C. In doing so,

the district court erred.

This court has previously decided that if a contract involves both the sale of goods and services, and the parties have presented the case to the trial court and the Supreme Court on the theory that the sales article of the U.C.C. applies, this court will dispose of the case on appeal on that theory. See, *Hammond v. Streeter*, 225 Neb. 491, 406 N.W.2d 633 (1987); *Sesostris Temple Golden Dunes v. Schuman*, 226 Neb. 7, 409 N.W.2d 298 (1987).

The first issue to be determined is whether a contract was formed between the parties. Neb. U.C.C. § 2-204 (Reissue 1980) on formation of a contract states:

> (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.
>
> (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined.
>
> (3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

A contract may be found in the bargain of the parties by their language or by implication from other circumstances, such as course of dealings or usage of trade. *Crane Co. v. Roberts Supply Co.*, 196 Neb. 67, 241 N.W.2d 516 (1976). See, also, Neb. U.C.C. § 1-201(3) (Reissue 1980).

The conduct of the parties in the case before us would support a finding that a contract existed. Industrial submitted an oral proposal to Nebraska Builders to supply cranes for the service center in telephone calls on March 10, 1985, and on March 12 or 13. Later, Industrial confirmed the offer in a letter dated March 26, 1985, written to Hawkins by Brennan, as sales manager of Industrial. That letter consisted of seven pages and was quite explicit. It stated in part:

> This letter is to confirm our telecom regarding the above subject. Per that telecom, we are pleased to propose the following.

> IEI proposes to furnish all Crane Systems, Jib Cranes and Monorail Systems per Specification #11520 dated 2/26/85 including the three Addendums.
>
> We also propose to furnish the following: [There then followed a detailed listing and description of 14 different cranes and a machine shop monorail.]

There then followed a statement that the material price on the above items would be $399,935, with an additional cost to install those items of $49,985. The letter went on to state:

> Our quotation is based on delivery of all items of equipment and materials so that work can proceed in a proper sequence of erection.
>
> Our prices does [sic] not include applicable taxes on materials and freight charges to jobsite. Terms are to be negotiated prior to acceptance of order. Delivery is to be schedule [sic] with the erection of building.

Included within exhibit 14 were four pages of detailed specifications, including what was termed a "Clearance Sketch."

Nebraska Builders relied on the bid contained in the telephone calls and letter in submitting its own bid as a material supplier on the project. Immediately after Hawkins learned that Nebraska Builders' bid had been accepted by the general contractor, Hawkins stated, he called Industrial and accepted the offer. Brennan, however, denies his having this telephone conversation.

A review of the facts in a light most favorable to Industrial, the prevailing party, would support a finding that the offer was never orally accepted by telephone. However, Industrial's conduct in submitting the information and shop drawings and the correspondence between Industrial and Nebraska Builders concerning the variance approval contradicts such a finding. In addition, Brennan also visited Nebraska Builders' office on August 8, 1985, almost 5 months after the alleged agreement was made, to answer questions on the crane systems that Industrial would supply.

The written proposal, the exchange of information on the project, and the oral conversations between Nebraska Builders and Industrial manifest the intent that a contract existed

between the parties.

The next issue to be decided is whether the contract fails for indefiniteness. The trial court in the case at hand found that the parties had negotiated to enter into an agreement at a later time which would include among other items the delivery dates, payment schedules, and specific waivers of the specifications, and that as a result there was no contract. The trial court cited the cases *Fleming Co. of Nebraska v. Michals*, 230 Neb. 753, 433 N.W.2d 505 (1988), and *Nebraska Seed Co. v. Harsh*, 98 Neb. 89, 152 N.W. 310 (1915). *Michals* and *Harsh*, however, are not controlling in determining what constitutes an enforceable contract under the U.C.C., since they construe contracts formed under common law.

According to § 2-204(3), a contract does not fail for indefiniteness because a term is left open, as long as the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. Cf. *Zimmerman v. Martindale*, 221 Neb. 344, 377 N.W.2d 94 (1985) (when an agreement not covered by the U.C.C. stipulates that certain terms will be settled later by the parties, such terms will not become binding unless and until they are settled by later agreement). The U.C.C. allows the courts to supply reasonable terms for those that are missing. See Neb. U.C.C. §§ 2-305 (Reissue 1980) (price), 2-308 (Reissue 1980) (place of delivery), 2-309 (Reissue 1980) (time of delivery), 2-310 (Reissue 1980) (payment terms), 2-503 (Reissue 1980) (tender by seller), 2-509 (Reissue 1980) (risk of loss), 2-511 (Reissue 1980) (tender by buyer), and 2-513 (Reissue 1980) (buyer's inspection). The official comment to § 2-204 states:

> If the parties intend to enter into a binding agreement, this subsection recognizes that agreement as valid in law, despite missing terms, if there is any reasonably certain basis for granting a remedy. The test is not certainty as to what the parties were to do nor as to the exact amount of damages due the plaintiff. Nor is the fact that one or more terms are left to be agreed upon enough of itself to defeat an otherwise adequate agreement. Rather, commercial standards on the point of "indefiniteness" are intended to be applied, this act making provision elsewhere for

missing terms needed for performance, open price, remedies and the like.

The only necessary term to satisfy the definiteness requirement under the U.C.C. is the quantity. See Neb. U.C.C. § 2-201(1) (Reissue 1980). But see Neb. U.C.C. § 2-306 (Reissue 1980). In the case at bar, the quantity requirement was satisfied, since the proposal letter listed the materials to be furnished, i.e., 14 cranes and 1 monorail. Since the conduct of the parties indicated that the parties intended to make a contract, the requirements of § 2-204(3) have been met, and the contract is not indefinite. The fact that the parties intended to execute a written agreement in the future is immaterial in this case, since the U.C.C. focuses on the parties' conduct. The trial court was therefore clearly wrong in finding that no enforceable contract existed.

Industrial argues that the formation of any contract would have been conditional upon approval of the variances, since both parties knew that the equipment proposed contained variances that required written approval from the project engineer. This argument fails. An enforceable contract can be formed and still retain a condition to performance of that contract. See, *Hahn v. International Management Services, Inc.*, 207 Neb. 229, 298 N.W.2d 140 (1980); *Bellevue College v. Greater Omaha Realty Co.*, 217 Neb. 183, 348 N.W.2d 837 (1984). In other words, contrary to what Industrial contends, it is the performance of the contract that is conditional, not the formation.

A condition is excused if the occurrence of the condition is prevented by the party whose performance is subject to the condition. *Hahn, supra.* In *Hahn*, the parties entered into an agreement for the purchase of real estate conditioned upon the buyer entering into an agreement to complete a nursing home for the price that had been quoted by the seller, to protect the buyer against increases in labor and material costs. The court found that the buyer was under a duty to make a good faith effort to enter into an agreement. The failure of the buyer to make such an effort excuses the condition. Since Industrial never obtained variance approval but elected not to perform instead, it cannot use the condition as a defense to

performance.

First, the proposal letter stated that the materials to be provided would meet specifications. The materials did not meet specifications as promised. It was up to Industrial to attempt to meet the specifications. Second, O.P.P.D. was required to accept any materials of equal quality. Industrial by its May 31, 1985, letter promised all materials would be of equal quality to or better quality than the equipment specified. Therefore, approval should not have been a problem. Finally, Industrial elected not to perform under the contract rather than continue to seek variance approval.

The last issue argued by Industrial is that Nebraska Builders' action is barred by the statute of frauds. Section 2-201 of the U.C.C. states the formal requirements of the statute of frauds:

> (1) Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
>
> . . . .
>
> (3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable . . . (b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted . . . .

Since the value of the cranes exceeds $500, the statute of frauds is applicable. Therefore, we turn to the question whether the requirements of the statute of frauds have been met. In the case *Veik v. The Tilden Bank*, 200 Neb. 705, 265 N.W.2d 214 (1978), a letter was found to be sufficient to satisfy the requirements of the statute of frauds. This court stated that a

writing will be sufficient to avoid the U.C.C. statute of frauds if the writing evidences a contract for the sale of goods, is signed by the party against whom enforcement is sought, and specifies a quantity. The required writing need not contain all the material terms of the contract. According to comment 1 to § 2-201, the writing needs only to afford a basis for believing that the offered oral evidence rests on a real transaction.

Several writings can be pieced together to satisfy the requirement, even though the writings taken alone would not have been sufficient. See, *Reich v. Helen Harper, Inc.*, 3 U.C.C. Rep. Serv. (Callaghan) 1048 (N.Y. City Civ. Dec. 27, 1966) (a sales confirmation and an invoice sent by the seller's agent to the buyer, combined with a letter by the buyer criticizing the quality of the goods, satisfy the writing requirement of § 2-201(1)); *Waltham Truck Equip. Corp. v. Massachusetts Equip. Co.*, 7 Mass. App. 580, 389 N.E.2d 753 (1979) (three separate letters signed by a representative of the buyer can be read together to satisfy the statute of frauds, even though two letters indicated a dispute as to one of the terms of the contract).

In the case at bar, the proposal letter and the followup letters indicate that a contract was formed. The proposal letter of March 26, 1985, begins with the following sentence: "This letter is to confirm our telecom regarding the above subject [i.e., 'Jib Cranes and Monorails']." The letter states the quantity of the goods to be furnished; the items, 14 cranes and 1 monorail, are listed in detail. After the alleged phone conversation in which Nebraska Builders accepted Industrial's bid, a correspondence between the two parties emerged concerning the materials to be furnished. A letter sent by Brennan dated May 31, 1985, assures Nebraska Builders that Industrial has adhered to the plans and specifications required by O.P.P.D. In a subsequent letter dated June 10, 1985, Brennan states that Industrial is "trying to alleviate the confusion of the materials that Industrial *is supplying*." (Emphasis supplied.) The letter refers to the included brochures, which "show that the equipment *to be furnished* meets the standards and quality [required by O.P.P.D.]." (Emphasis supplied.) The letter ends as follows: "We hope this letter will alleviate any confusion regarding the

materials to be furnished and *we look forward to working with you on this project*." (Emphasis supplied.)

On August 9, 1985, Brennan sent another letter to Nebraska Builders in which he "assume[s] that the hoist/trolley units will be furnished by others or would be an adder to the *contract*." (Emphasis supplied.) Finally, on August 15, 1985, Brennan sent Hawkins a letter in which he recommends a certain foundation for the bolt setting of the mast-type jib crane. The letter includes several drawings. The drawings were returned to Industrial with notes and corrections on them made by Nebraska Builders' architect.

The three requirements of the statute of frauds § 2-201 are satisfied when the five letters are read together. First, the letters clearly evidence a sale of goods. Second, the writings are signed by the authorized agent of the party against whom enforcement is sought. In the case at hand, enforcement of the contract is sought against Industrial, and the letters are all signed by Brennan, who had the authority to contract on behalf of Industrial. Last, the quantity of the goods to be sold is indicated in the letter dated March 26, 1985, which describes in detail 14 cranes and 1 monorail.

The agreement is also enforceable, since the case falls within the statute of frauds exception of § 2-201(3)(b). According to § 2-201(3)(b), oral contracts may be enforced absent a writing "if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made . . . ." Comment 7 to § 2-201 states that "it is no longer possible to admit the contract in court and still treat the statute as a defense."

Section 2-201(3)(b) contains the following three requirements: There must be an admission; the admission must be made by the party against whom enforcement of the oral contract is sought; and the admission must be made in court.

An admission within the meaning of § 2-201(3)(b) can be made "when the party denying the existence of the contract and relying on the statute takes the stand and, without admitting explicitly that a contract was made, testifies to facts which as a matter of law establish that a contract was formed." See *Lewis v. Hughes*, 276 Md. 247, 256-57, 346 A.2d 231, 236 (1975).

A compelled or involuntary admission of the existence of an oral contract, obtained during cross-examination at trial, may be relied upon to satisfy § 2-201(3)(b). See, *Lewis, supra*; *Dangerfield v. Markel*, 252 N.W.2d 184 (N.D. 1977), *appeal after remand* 278 N.W.2d 364 (N.D. 1979); *Meylor v. Brown*, 281 N.W.2d 632 (Iowa 1979); *Franklin Cty. Co-op. v. MFC Services (A.A.L.)*, 441 So. 2d 1376 (Miss. 1983); *M & W Farm Serv. Co. v. Callison*, 285 N.W.2d 271 (Iowa 1979). The statutory requirement can be satisfied by way of pleadings, bills of particulars, depositions, affidavits, admissions pursuant to notices to admit, and oral testimony, including admissions made on cross-examination. See *Reissman Int'l Corp. v. J.S.O. Wood Products*, 10 U.C.C. Rep. Serv. (Callaghan) 1165 (N.Y. Civ. June 6, 1972).

Brennan made the following admission while being cross-examined:

> Q At the meeting on October 14th in Chicago you specifically told Mr. Hawkins, did you not, either you or Mr. Cole, that Industrial Erectors would not perform or supply any cranes on this project unless it received compensation somewhere in the neighborhood of $150,000.00 more than that set forth in its bid, isn't that correct?
>
> A I believe it was stated, if the order was to be as per specified with the electrical circuitry and everything else, that there would be an increase *to the contract*.

Since Industrial disputes the fact that there was a meeting of the minds, and Brennan's testimony establishes the existence of a contract, his testimony should be considered an admission.

This case is very similar to *Ursa Farmers' Cooperative v. Trent*, 58 Ill. App. 3d 930, 374 N.E.2d 1123 (1978). In *Trent*, the defendant denied the making of a contract, but admitted at trial that he had testified during a discovery deposition: " 'Whoever I talked to, I contracted 2500 bushels of beans,' " and " 'I signed up for 2500 bushels of beans at [$]4.01.' " *Id.* at 931, 374 N.E.2d at 1124. The court held that the trial court properly concluded that the defendant had made an in-court admission of an oral contract for the sale of beans. We hold that similarly in this case Brennan's testimony, considering the circumstances

presented at trial, established the existence of an oral contract.

We do not hereby hold that an admission is made whenever the defendant utters the magic words contract or agreement. We acknowledge the possibility that laypeople might misuse legal terminology. We therefore suggest that if a party denying the existence of a contract uses contractual terminology, the court should look at the other evidence presented by the defendant. The record in this case shows that Brennan admitted submitting variance approval documents to Nebraska Builders shortly after the alleged agreement occurred. He also admitted that he sent a letter advising Nebraska Builders that Industrial would adhere to the specifications. In addition, Brennan testified that he visited Omaha and was looking for more commitment from Nebraska Builders in the form of a letter of intent or purchase order. Brennan's conduct indicates that an agreement between the parties existed. See *Quaney v. Tobyne*, 236 Kan. 201, 689 P.2d 844 (1984) (an admission can be established through verbal admission and conduct). In light of Brennan's conduct we consider the testimony previously quoted to be an admission, and not an inadvertently mistaken use of legal terminology.

The second requirement, that the admission be made by the party against whom enforcement is sought, is also satisfied, since Brennan made the admission on behalf of Industrial.

Last, the admission must be made in court. In *Wilke v. Holdrege Coop. Equity Exchange*, 200 Neb. 803, 265 N.W.2d 672 (1978), this court held that the exception of § 2-201(3)(b) did not apply to a letter of compromise written by plaintiff's attorney to the manager of the defendant, since the admission was not made in the pleading, testimony, or otherwise in court. The case at hand, however, is distinguishable from *Wilke*, since Brennan admitted to a contract during his testimony at trial. In *Farmland Service Coop, Inc. v. Klein*, 196 Neb. 538, 244 N.W.2d 86 (1976), we held that a letter confirming the oral agreement was not within the exceptions enumerated in § 2-201(3). The letter in *Farmland Service Coop* was referred to in a deposition, but never offered or received into evidence. The admission in the case at bar, however, was made by Brennan during his cross-examination at trial and thus offered into evidence. As a result the case falls within the exception to the

statute of frauds, and Industrial can therefore not use § 2-201 as a defense. The rationale is that the statute of frauds was not designed to protect a party who made an oral contract, but, rather, to aid a party who did not make a contract though one is claimed to have been made orally with him. See *Reissman Int'l Corp., supra.*

The district court's finding that no contract existed was based on an erroneous application of the law controlling this case. As previously mentioned, the parties stipulated at trial that the case was governed by the U.C.C. Even if the parties had not made this stipulation, the case should have been decided under the U.C.C., since the predominant factor of the alleged contract was the sale of goods. See *Mennonite Deaconess Home & Hosp. v. Gates Eng'g Co.*, 219 Neb. 303, 363 N.W.2d 155 (1985) (to determine whether a contract which involves both the sale of goods and services falls within the coverage of the U.C.C., the court looks at the predominant factor of the contract). Therefore, the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

NEBRASKA STATE BOARD OF AGRICULTURE, APPELLEE, V. NEBRASKA STATE RACING COMMISSION, APPELLANT.

478 N.W.2d 270

Filed January 3, 1992. No. 89-809.

1. **Declaratory Judgments: Judicial Construction: Statutes.** A declaratory judgment action, pursuant to Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1989), is an appropriate method to obtain judicial construction of a statute.
2. **Declaratory Judgments: Statutes.** A declaratory judgment action to construe a statute presents a question of law.
3. **Declaratory Judgments: Appeal and Error.** In an appeal from a declaratory judgment, the appellate court, regarding questions of law, has an obligation to reach its conclusion independent of the conclusion reached by the trial court.
4. **Statutes.** When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning, so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning.

5. _____. An expressed object of a statute's operation excludes the statute's operation on all other objects unmentioned by the statute.

Appeal from the District Court for Lancaster County: EARL J. WITTHOFF, Judge. Reversed and remanded with direction.

Robert M. Spire, Attorney General, and L. Jay Bartel for appellant.

Hal Bauer, of Bauer, Galter & O'Brien, for appellee.

Kim M. Robak, of Rembolt Ludtke Parker & Berger, for amicus curiae Platte County Agricultural Society.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

The Nebraska State Racing Commission (Racing Commission) appeals from a declaratory judgment granted by the district court for Lancaster County in favor of the Nebraska State Board of Agriculture (Board), namely, the judicial determination that the Board's racetrack at the State Fairgrounds in Lincoln had a "total annual parimutuel handle" of less than $12 million in 1987 and, therefore, was a "recipient track" entitled to receive money from the Track Distribution Fund under Neb. Rev. Stat. §§ 2-1208.03 and 2-1208.04 (Reissue 1987). To reach the foregoing conclusion, the district court construed the phrase "total annual parimutuel handle" to exclude any wagers accepted on simulcast races for the purposes of § 2-1208.03(5), which states: "Recipient track shall mean a racetrack with a total annual parimutuel handle, based on the previous racing year, of twelve million dollars or less." We reverse the district court's judgment.

This case involves interaction of two legislative programs, separately enacted to strengthen the "racing, breeding, and parimutuel wagering industry" in Nebraska. See, Neb. Rev. Stat. §§ 2-1224 through 2-1227 (Reissue 1987); §§ 2-1208.03 and 2-1208.04. The first of these programs is the Track Distribution Fund, by which revenue, based on a racetrack's total annual parimutuel handle, is distributed from larger racetracks to smaller racetracks. See §§ 2-1208.03 and

2-1208.04. The second program is a 1987 law authorizing "experimental" intrastate telecasting of horseraces, or "simulcasting," which permits Nebraska racetracks to accept wagers on races taking place at other locations, but which are broadcast by television to an authorized site where wagers are accepted on the televised race. See §§ 2-1224 et seq.

The question to be resolved is how wagers on simulcast races are involved in computing the total annual parimutuel handle for purposes of the Track Distribution Fund. The Racing Commission contends that wagers on simulcast races are part of the total annual parimutuel handle of the track where the wagers are accepted. The Board insists that the total amount wagered on simulcast races should be assigned to the total annual parimutuel handle of the track where the races are run and which is the origin of the racing telecast. The outcome of this case and a potential $200,000 distribution to the Board from the Track Distribution Fund depend on the definition of "total annual parimutuel handle," which is included in the legislation under examination, but which phraseology is undefined by Nebraska statutes.

TRACK DISTRIBUTION FUND

In 1986, the Legislature established the Track Distribution Fund, codified at §§ 2-1208.03 and 2-1208.04, for the purpose of subsidizing smaller Nebraska racetracks at the expense of the state's larger and more successful tracks. Money for the Track Distribution Fund is supplied by the tracks themselves, which are required to withhold a small percentage of their gross daily receipts from so-called "exotic wagers," such as the daily double, exacta, trifecta, pick six, and others. Each month, the racetracks pay the withheld funds to the Racing Commission, which maintains the Track Distribution Fund. Annual collections for the fund are subsequently distributed to qualifying tracks during the following year based on the formula provided in § 2-1208.04(2). To qualify for distributions from the Track Distribution Fund, a racetrack must be a recipient track under § 2-1208.03(5), previously set forth in this opinion.

INTRASTATE SIMULCASTING

In 1987, the Legislature authorized simulcasting of horseracing in Nebraska on an experimental basis. Simulcasting is a procedure under which a racetrack is permitted to accept wagers on races which are simultaneously televised from other Nebraska racetracks, or, as expressed in § 2-1225(6): "Simulcast shall mean the telecast of live audio and visual signals conducted in the state for the purpose of parimutuel wagering." The Board's Lincoln track is a "simulcast facility," that is, "a facility within the state which is authorized to display simulcasts for parimutuel wagering purposes . . . ." See § 2-1225(7).

Section 2-1227 provides in pertinent part:

> (4) Any simulcast between a sending track and receiving track . . . shall result in the combination of all wagers placed at the receiving track with the wagers placed at the sending track so as to produce common parimutuel betting pools for the calculation of odds and the determination of payouts from such pools, which payout shall be the same for all winning tickets, irrespective of whether the wager is placed at a sending track or receiving track.

FACTUAL BACKGROUND

The salient facts are either stipulated or undisputed.

In August 1987, the Board entered into a simulcast agreement with the Platte County Agricultural Society, which operated the racetrack at Columbus, Nebraska. Under this agreement, the Board, at its Lincoln racetrack, accepted bets on races simulcast from Columbus. Also, the agreement provided that the Board's track and the Columbus track would equally share expenses incurred and revenue generated by the simulcast races. During the 7 days of simulcasting in 1987, the Board accepted $508,553 in wagers at its Lincoln track on simulcast races run at Columbus. During the entire year of 1987, the Board's racetrack in Lincoln accepted a total of $12,034,795 in wagers, which included $11,526,242 bet on races run at the Board's Lincoln track and the $508,553 bet at the Lincoln track on races simulcast from Columbus.

In February 1988, the Board claimed that it was entitled to money from the Track Distribution Fund, since its total annual parimutuel handle for 1987 was $11,526,242, based on $12,034,777 (sic) in total wagers placed at the Board's Lincoln track during 1987 less $508,535 (sic) bet on simulcast races from Columbus. The Racing Commission rejected the Board's claim and refused to make a distribution to the Board from the Track Distribution Fund.

On August 8, 1988, the Board filed a declaratory judgment action in the district court for Lancaster County, seeking judicial declaration that the Board was a recipient track under § 2-1208.03(5), and requested that the Racing Commission be ordered to distribute to the Board the appropriate amount from the Track Distribution Fund.

DISTRICT COURT'S DECISION

The district court concluded that "the simulcast handle resulting from the simulcast participation by [the Board] and Columbus during the year 1987, should be treated as part of the handle at the sending track (Columbus) during the year 1987." In other words, the district court excluded from the Board's handle all wagers placed at the Board's Lincoln track on races simulcast from Columbus. On that basis, the district court decided that the Board's Lincoln track was "a recipient track for the year 1987 pursuant to Neb.Rev.Stat. §2-1208.03," since the total annual parimutuel handle of the Board's Lincoln track was less than $12 million, and then ordered the Racing Commission "to distribute to [the Board] from the Track Distribution Fund an amount pursuant to Neb. Rev. Stat. §2-1208.04, for the year 1987."

ASSIGNMENT OF ERROR

In its appeal, the Racing Commission contends that the district court erred by excluding from the Board's total annual parimutuel handle for 1987 all wagers placed at the Board's Lincoln track on simulcast races from the Columbus track.

STANDARD OF REVIEW

A declaratory judgment action, pursuant to Neb. Rev. Stat. §§ 25-21,149 et seq. (Reissue 1989), is an appropriate method to

obtain judicial construction of a statute. See, *State ex rel. Spire v. Northwestern Bell Tel. Co.*, 233 Neb. 262, 445 N.W.2d 284 (1989); *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 388 N.W.2d 93 (1986). "A declaratory judgment action to construe a statute presents a question of law." *Pump & Pantry, Inc. v. City of Grand Island*, 233 Neb. 191, 194, 444 N.W.2d 312, 315 (1989). "In an appeal from a declaratory judgment, the appellate court, regarding questions of law, has an obligation to reach its conclusion independent from the conclusion reached by the trial court." *State ex rel. Spire, supra* at 265, 445 N.W.2d at 287. See, also, *County of York v. Johnson*, 230 Neb. 403, 432 N.W.2d 215 (1988); *Cornhusker Christian Ch. Home v. Dept. of Soc. Servs.*, 227 Neb. 94, 416 N.W.2d 551 (1987); *Boisen v. Petersen Flying Serv.*, 222 Neb. 239, 383 N.W.2d 29 (1986).

"When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning." *State v. Crowdell*, 234 Neb. 469, 473-74, 451 N.W.2d 695, 699 (1990). Accord, *State ex rel. Gaddis v. Gaddis*, 237 Neb. 264, 465 N.W.2d 773 (1991); *Video Consultants v. Douglas*, 219 Neb. 868, 367 N.W.2d 697 (1985).

STATUTORY LANGUAGE IN QUESTION

The fundamental question is: What is the meaning of "total annual parimutuel handle" in § 2-1208.03(5)?

The Racing Commission urges that total annual parimutuel handle means the total of all wagers actually placed at a licensed racetrack, including any wagers made on races simulcast from another location. Conversely, the Board argues that wagers made on simulcast races are properly assignable to the total annual parimutuel handle of the sending track, viz, the track at which the race is actually run.

As mentioned above, the phrase "total annual parimutuel handle" is undefined in Nebraska statutes. However, "total" is ordinarily understood to mean the "entire amount" or "aggregate." Webster's Third New International Dictionary, Unabridged 2414 (1981). "Annual" connotes "yearly" and, as

used in § 2-1208.03(5), refers to the "racing year" or the particular year during which horseraces are run or have been run. Section 2-1208.04(1) indicates that the "racing year" for the purpose of the Track Distribution Fund begins on January 1; consequently, "annual," as used in § 2-1208.03(5) means the calendar year. "Parimutuel" refers to the wagering system authorized in Neb. Rev. Stat. § 2-1207(1) (Reissue 1987):

> Under such system the licensee may receive wagers of money from any person present at such race or racetrack receiving the simulcast race on any horse in a race selected by such person to run first in such race, and the person so wagering shall acquire an interest in the total money so wagered on all horses in such race as first winners in proportion to the amount of money wagered by him or her. . . . The balance remaining on hand [after the required deductions] shall be paid out to the holders of certificates on the winning horse in the proportion that the amount wagered by each certificate holder bears to the total amount wagered on all horses in such race to run first. The licensee may likewise receive such wagers on horses selected to run second, third, or both, or in such combinations as the commission may authorize. . . .

The meaning of "handle," used in § 2-1208.03(5), raises a question for which there is a readily available answer. Even to those who are not among the cognoscenti of horseracing, handle has a standard meaning in everyday usage for wagering: "the total amount of money bet on a race, game, or event or over a period of time (as a season)." Webster's Third New International Dictionary, Unabridged 1027 (1981). Based on the foregoing, we conclude that the phrase "total annual parimutuel handle," used in § 2-1208.03(5), means the aggregate dollar amount of wagers accepted over the course of a calendar year.

Adoption of the preceding definition, however, does not end our analysis, because total annual parimutuel handle is meaningful only when calculated in reference to something else, such as a particular track or tracks, particular types of races, or particular types of wagers. In other words, total annual parimutuel handle could refer to wagers placed *at* a track or

placed *on* some race which occurs at another site. In the present case, the reference point is supplied by § 2-1208.03(5), which refers specifically to "a racetrack."

By limiting the focus to a racetrack, instead of types of races run or types of wagers accepted, the Legislature has expressed its intent that the aggregate dollar amount of wagers accepted over the course of a calendar year at a racetrack shall be used in determining whether the racetrack qualifies for money from the Track Distribution Fund. Under § 2-1208.03(5), all wagers placed at the track are aggregately considered for the purpose of the statute, whether such wagers are placed on races occurring at the site where the wagers are placed or are placed on races simulcast to the site where wagers are placed.

We are aware that § 2-1227(4) requires "the combination of all wagers placed at the receiving track with the wagers placed at the sending track." However, § 2-1227(4) provides that the combination of wagers is for the limited purpose of "the calculation of odds and the determination of payouts." Under the general principle of statutory construction that an expressed object of a statute's operation excludes the statute's operation on all other objects unmentioned by the statute, the combination of wagers under § 2-1227(4) is restricted to the purpose or object expressed in the statute, i.e., calculation of odds in a race and determination of payments from pools resulting from parimutuel betting on the race. See, *Nebraska City Education Assn. v. School Dist. of Nebraska City*, 201 Neb. 303, 267 N.W.2d 530 (1978) (expressio unius est exclusio alterius, the expression of one thing is the exclusion of another; when a statute specifies the object of its operation, the statute excludes its operation on every object not expressly mentioned by the statute); *Galstan v. School Dist. of Omaha*, 177 Neb. 319, 128 N.W.2d 790 (1964); *Starman v. Shirley*, 162 Neb. 613, 76 N.W.2d 749 (1956); *Harrington v. Grieser*, 154 Neb. 685, 48 N.W.2d 753 (1951).

Therefore, the Racing Commission must include and use all wagers accepted at the Board's Lincoln track to determine whether the Lincoln track qualifies as a recipient track under § 2-1208.03(5). Because the Board accepted a total of $12,034,795 in wagers during the 1987 racing year, the Board's

Lincoln racetrack did not qualify as a recipient track under § 2-1208.03(5) for 1987 and, therefore, is ineligible to receive money from the Track Distribution Fund for 1987. Accordingly, the district court's judgment is reversed, and this cause is remanded for entry of judgment in the district court in accordance with this opinion.

REVERSED AND REMANDED WITH DIRECTION.

SUSAN JO KNOTT, APPELLEE, V. STEVEN ROBERT KNOTT, APPELLANT.

478 N.W.2d 275

Filed January 3, 1992. No. 89-1187.

Appeal from the District Court for Sarpy County: GEORGE A. THOMPSON, Judge. Affirmed as modified.

Sally Millett Rau for appellant.

Brian P. Sapone, of Sherrets & Smith, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Respondent, Steven Robert Knott, has appealed from the judgment of the district court in a dissolution of marriage proceeding. His sole assignment of error is that the trial court erred in awarding an excessive amount of alimony for too long a period of time.

We have reviewed the record de novo, as we are required to do. See *Moser v. Moser*, *ante* p. 617, 476 N.W.2d 922 (1991). We determine that the trial court abused its discretion in its order as to the amount and length of alimony to be paid by appellant. We modify the decree to provide that appellant shall pay to appellee the sum of $350 per month, beginning with the date of the dissolution decree, for a period of 6 years. The decree is affirmed in all other respects. We decline to award attorney fees in this appeal.

AFFIRMED AS MODIFIED.

RUSSELL B. BARELMANN AND SHARON K. BARELMANN, APPELLANTS, V. CHARLES R. FOX, APPELLEE.
CHAMBERS STATE BANK, APPELLEE, V. RUSSELL B. BARELMANN AND SHARON K. BARELMANN, APPELLANTS.
RUSSELL B. BARELMANN AND SHARON K. BARELMANN, APPELLANTS, V. CHARLES R. FOX ET AL., APPELLEES.

478 N.W.2d 548

Filed January 10, 1992. Nos. 89-499, 89-713, 89-1383.

1. **Demurrer: Pleadings.** In considering a demurrer, a court accepts the truth of the facts well pled and the factual and legal inferences which may reasonably be deduced therefrom, but does not accept the conclusions of the pleader.
2. **Replevin: Time.** In an action in replevin, the focus is on the rights of the parties when the action is filed, and what takes place thereafter is immaterial in the consideration and determination of the case.
3. _____: _____. The issue in a replevin action is not ownership of the property, but the right to immediate possession at the time of the commencement of the action, and, as a general rule, all matters foreign to the issue of possession must be excluded from consideration and are not available as defenses.
4. **Summary Judgment.** Summary judgment is properly granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such facts and that the moving party is entitled to judgment as a matter of law.
5. **Summary Judgment: Proof.** Once the movant for summary judgment has established facts entitling the movant to summary judgment, the nonmovant has the burden of presenting evidence to show an issue of material fact which prevents a judgment as a matter of law.
6. **Summary Judgment: Appeal and Error.** On appeal from a summary judgment, it is an appellate court's duty to review the evidence in a light most favorable to the party against whom the judgment was granted and give such party the benefit of all reasonable inferences deducible from the evidence.
7. **Debtors and Creditors: Security Interests: Consideration.** No consideration is necessary for an instrument given as security for a debt already owed by the party giving it.
8. **Replevin: Costs: Bonds.** A successful plaintiff in replevin is entitled to recover the reasonable cost of the bond required of it by Neb. Rev. Stat. § 25-1098 (Reissue 1989).
9. **Summary Judgment: Affidavits: Time.** Neb. Rev. Stat. § 25-1332 (Reissue 1989) requires that the party resisting a motion for summary judgment serve any affidavits in opposition to the motion by the day prior to the hearing.
10. **Torts: Conversion: Property: Words and Phrases.** Tortious conversion is any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights.
11. **Conversion: Property: Proof: Tort-feasors.** A plaintiff in conversion must show

(1) an immediate right to possession of the property and (2) its wrongful possession by the tort-feasor.

12. **Livestock: Damages: Proof.** The measure of damages for nonfatal injuries to livestock is the difference in the market value of the animal immediately before and immediately after the injury.
13. **Declaratory Judgments.** Actions for declaratory judgment are not to be entertained where another equally serviceable remedy has been provided by law, nor are they to be used to create new causes of action or cumulative remedies.
14. **Demurrer: Pleadings.** A demurrer tests the substantive legal rights of the parties, and a petition will be found sufficient if, from the statement of facts set forth in the petition, the law entitles a plaintiff to recover.

Appeal from the District Court for Holt County: EDWARD E. HANNON, Judge. Affirmed.

Michael B. Kratville, of Kratville Law Offices, for appellants.

Daniel D. Jewell, of Jewell, Gatz, Collins, Dreier & Fitzgerald, for appellees Fox, Wrede, and Watson.

Forrest F. Peetz, of Peetz and Peetz, for appellee Bank.

James A. Widtfeldt for appellee Kerkman.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

I. INTRODUCTION

This opinion adjudicates three individual appeals, each taken in one of three separate but interrelated suits having as their origins the replevin action successfully brought by appellee, Chambers State Bank, against appellants, Russell B. Barelmann and his wife, Sharon K. Barelmann, in which the Barelmanns unsuccessfully counterclaimed for damages. Although this was the first suit filed, it was the second one appealed and is docketed in this court as case No. 89-713.

In the second suit filed, but the third appealed and docketed in this court as case No. 89-1383, the appellants Barelmann unsuccessfully sought redress, under a variety of theories, for the manner in which the replevied property was seized by the appellees, Charles R. Fox, Holt County Sheriff; Everett Watson and Clarence C. Wrede, Holt County Deputy Sheriffs;

Lyle Kerkman, appraiser; Troy Judge, Marvin Stauffer, and Mark Johnson, assistants to the appraiser; and the County of Holt. We hereafter refer to this action as the misconduct suit.

Although docketed last, the third suit was appealed first and bears case No. 89-499 in this court. It came into being after the appellants Barelmann were permitted to sever from the misconduct suit their unsuccessful effort to obtain a declaratory judgment as to their rights against the appellee Fox alone.

In each case, we affirm.

II. FACTS

Following a long course of dealing, the Barelmanns, who are residents of Chambers, Holt County, Nebraska, executed two promissory notes in favor of the bank. The first note, executed on April 19, 1985, in the initial amount of $99,029.48 and paid down to $98,729.48, represents a renewal and consolidation of other notes and the accumulated interest thereon. The second promissory note, in the initial amount of $2,500 and paid down to $500, was executed on April 22, 1985, for "Fuel, Hog Feed, & Expenses."

On April 19, 1985, the Barelmanns also executed a financing statement and security agreement, which gave the bank an interest in certain specified property and in all equipment and farm products, including but not limited to crops, livestock, and supplies the Barelmanns then owned or might thereafter acquire. Each note provides that it, at the option of the bank and without notice or demand, upon the commencement by the Barelmanns of any proceeding under any bankruptcy law, becomes immediately payable in full.

On May 3, 1985, the Barelmanns filed for protection under chapter XI of the federal Bankruptcy Act, 11 U.S.C. §§ 101 et seq. (1982 & Supp. III 1985). As permitted by 11 U.S.C. § 362 (Supp. III 1985), the bank filed a motion for relief from the automatic stay arising in such situations in order that it might seek to enforce rights it claimed against the Barelmanns. The U.S. Bankruptcy Court for the District of Nebraska granted the bank's motion.

The bank next, on September 8, 1986, filed the replevin

action described in part I, alleging that the Barelmanns were in default on loans in the principal sum of $99,229.48 and that, as a consequence, it was entitled to foreclose on the liens it held on the Barelmanns' property.

On September 23, 1986, the district court entered an order permitting the bank to replevy certain designated property held by the Barelmanns, including certain cattle and specified farm equipment. Fox, with the assistance of Watson, Wrede, Kerkman, Judge, Stauffer, and Johnson, thereafter seized the property listed in the replevin order, as well as other property which was not listed therein.

The Barelmanns subsequently filed a motion seeking return of some of the unlisted property. In response, on October 14, 1986, several of the items seized, including the cattle, were returned to the Barelmanns. The Barelmanns thereafter filed a second motion seeking the return of additional unlisted property or its value. A hearing on that motion was set for December 18, 1986; however, the Barelmanns failed to appear, and, consequently, the second motion was overruled.

Thereafter followed a series of attempts by the Barelmanns to indirectly reclaim the remaining unlisted property by asserting a variety of other damages. The answer filed on January 5, 1987, raised several affirmative defenses, including want of consideration, fraud, coercion, breach of contract, and undue influence, and asserted by way of counterclaim that the bank owed them approximately $300,000.

An even more intensive pleading war then ensued in which the bank by motions and demurrer challenged the Barelmanns' answer, amended answer, and second amended answer. After the district court sustained a portion of the bank's demurrer, it resolved the remaining issues in favor of the bank by a partial summary judgment and later by a directed verdict for the bank at the close of the Barelmanns' case.

While the pleading war in the replevin action was still being fought, the Barelmanns opened a second front by filing the misconduct suit described in part I, seeking damages from the appellees Fox, his deputies, the appraiser Kerkman, Kerkman's assistants, and the county.

In response to appellees' motion to strike the petition in the

misconduct suit, the Barelmanns filed an amended petition and then a second, third, and fourth such petition. In their fourth amended effort, the Barelmanns for the first time sought a declaratory judgment that the replevin was conducted in violation of law. The appellees again demurred; the district court sustained one of the demurrers as to Holt County, but denied the demurrers as to Fox, his deputies, the appraiser, and his assistants. In addition, the district court sustained one of the demurrers as to certain other theories of recovery and dismissed them. The Barelmanns then filed a fifth amended petition, making no mention of the county but again seeking a declaratory judgment that Fox and certain of the others had conducted the replevin improperly, to the Barelmanns' damage. The district court sustained the remaining appellees' demurrer as to the declaratory judgment and dismissed that action, stating that the Barelmanns could not "set forth a meritorious claim on the matters alleged in that cause of action." That left pending in this misconduct suit the causes of action for conversion and trespass, as to which the remaining defending parties successfully filed motions for summary judgment.

As noted in part I, the Barelmanns also filed in the misconduct suit a motion to sever the declaratory judgment action and a motion to amend by dismissing therefrom all parties except Fox, which motions the district court granted.

The declaratory judgment action against Fox was then brought as the third separate suit. The district court sustained Fox's demurrer thereto and dismissed the action.

III. ANALYSIS OF REPLEVIN ACTION
(CASE NO. 89-713)

In this case, the Barelmanns have assigned 10 errors, which, as argued by the Barelmanns, may be summarized as claiming that the district court erred in sustaining the bank's demurrer to certain of the Barelmanns' defenses and striking the same from their answer and counterclaim; granting the bank a partial summary judgment as to other defenses; granting the bank a directed verdict at the close of the Barelmanns' evidence; ruling during trial against the Barelmanns on certain evidential matters; and, finally, taxing the cost of the bank's replevin bond

to them.

1. DEFENSES STRICKEN ON DEMURRER

The Barelmanns claim that the district court improvidently struck their assertions that the bank failed to make an appropriate demand before instituting this action, levied on exempt property, and refused to execute a lien waiver on a corn crop maturing after the replevin action was commenced, and that the Barelmanns were not given an opportunity to post a bond, as contemplated by Neb. Rev. Stat. § 25-1098 (Reissue 1989), rather than have the replevied property delivered to the bank. In addition, the Barelmanns complain that the district court struck the paragraph of their answer which concludes that their allegations constitute the affirmative defenses of "accord and satisfication [sic], dirress [sic], estoppel, failure of consideration, fraud, illegality, payment and waiver."

We begin this aspect of our review by recalling the rule that in considering a demurrer, a court accepts the truth of the facts well pled and the factual and legal inferences which may reasonably be deduced therefrom, but does not accept the conclusions of the pleader. *Matheson v. Stork, ante* p. 547, 477 N.W.2d 156 (1991); *Braesch v. Union Ins. Co.*, 237 Neb. 44, 464 N.W.2d 769 (1991). Although this rule is generally encountered in the context of a demurrer to a petition, it has equal application to a demurrer to an answer. See *Newman Grove Creamery Co. v. Deaver*, 208 Neb. 178, 302 N.W.2d 697 (1981).

That rule takes care of the first two of the Barelmanns' contentions, for they allege no facts supporting a conclusion that in the context of this replevin action, the bank had any duty to make a prior demand or that any of the property it seized was exempt from the operation of the subject notes and the security agreement of April 19, 1985. The rule also takes care of the Barelmanns' concern with their claim that they were not given an opportunity to post the bond contemplated by § 25-1098, as they did not allege facts showing that they were ready, willing, and able to post such a bond, had the opportunity been presented.

It is true that leave to amend should ordinarily be granted

when a demurrer has been sustained; but such leave is not necessary if there is no reasonable probability that the pleader can remedy the defect. See, *Kane v. Vodicka*, 238 Neb. 436, 471 N.W.2d 136 (1991); *Schmuecker Bros. Implement v. Sobotka*, 217 Neb. 114, 348 N.W.2d 130 (1984). Given the language of the notes and security document, there were no allegations the Barelmanns could make to require a demand or make the replevied property exempt. Their ability to plead that they were ready, willing, and able to post a bond of at least double the value of the property replevied, as § 25-1098 requires, is negated by the bankruptcy.

The Barelmanns' third contention, that the bank failed to execute a lien waiver on a crop maturing after this action was instituted, is resolved by the rule that rights of possession are to be determined as of the time the replevin action was commenced. See *Brown v. Hogan*, 49 Neb. 746, 69 N.W. 100 (1896). As stated in *Alliance Loan & Investment Co. v. Morgan*, 154 Neb. 745, 747, 49 N.W.2d 593, 594 (1951), the focus is on the rights of the parties when the action is filed, and "[w]hat takes place thereafter is immaterial in the consideration and determination of the case."

The remaining contention, that the district court committed prejudicial error in striking the characterization of the legal nature of the facts pled, is also without merit. Either the facts alleged support a legal theory of defense, or they do not. That inquiry is the subject of the analyses which follow.

2. Summary Judgment, Directed Verdict, and Other Rulings

We begin our analysis of the propriety of the district court's grant of a partial summary judgment, direction of the verdict, and trial rulings by reviewing the nature of a replevin action. In *Schrandt v. Young*, 62 Neb. 254, 259, 86 N.W. 1085, 1087 (1901), citing *Gillespie v. Brown & Ryan Bros.*, 16 Neb. 457, 20 N.W. 632 (1884), this court stated: "The replevin action is primarily to adjudicate the possession of the property. Other rights and claims must be determined, as a general rule, in other appropriate proceedings, even though closely connected with the controversy out of which the contest over possession

arises."

The plaintiff in *Securities Investment Corporation v. Krejci*, 132 Neb. 146, 271 N.W. 287 (1937), sought to replevy a truck subject to a chattel mortgage. The defendant filed a general denial and raised the defense that the plaintiff owed the defendant for breach of warranty and misrepresentation in relation to the sale of the truck. Although this court reversed the verdict in defendant's favor, it stated at 147, 271 N.W. at 287:

> Certainly, if the plaintiff is indebted to the defendant for damages resulting from a breach of warranty or misrepresentation *in the sale of the truck involved in the transaction*, which damages are at least equal to the amount due upon the note, it is a valid defense in a replevin action.

(Emphasis supplied.)

In *Arcadia State Bank v. Nelson*, 222 Neb. 704, 386 N.W.2d 451 (1986), this court reiterated that the subject matter of a replevin action is very narrow. " '[S]ince the main issue in a replevin action is one of title and right to possession, all matters foreign thereto must be excluded from consideration and are not available as defenses.' " *Id.* at 711, 386 N.W.2d at 457. "[T]he issue in replevin is not *ownership* of the property . . . but the *right to immediate possession at the time of the commencement of the action*." (Emphasis in original.) *Id.* at 712, 386 N.W.2d at 457-58.

The *Arcadia* plaintiff filed a replevin action against the defendants, Carl Nelson and his wife and son, seeking the immediate possession of certain items of personal property which had been pledged to the plaintiff by the husband. At the time the replevin petition was filed, all the property was in the possession of the husband, and the records on file with the county clerk revealed that the husband had executed a financing statement in favor of the son.

Each *Arcadia* defendant answered separately, and the plaintiff moved for summary judgment against each of them. The trial court sustained the motion as to the husband, but overruled it as to the wife and son, as those two had denied that the husband was the sole owner of the property. After a trial,

judgment was also entered against the wife, but the jury found the son had an ownership interest in the property. The plaintiff appealed from the finding for the son.

The *Arcadia* court ruled that once the trial court had entered summary judgment in favor of the plaintiff and against the husband, the only party in possession of the property sought to be replevied, the lawsuit was over. The *Arcadia* court observed, however, that had the property been in the son's possession rather than the husband's, the son's alleged claim of ownership might have been relevant. But as the facts established that the property was in the husband's possession, the son's interest was not relevant.

> All that the Bank was seeking to do was to obtain possession. The replevin did not give it a right to dispose of the property, only the right to have possession. Its right to dispose of the property came by reason of the security agreement signed by Carl Nelson. If, indeed, the Bank did not have the right to dispose of the property, once having acquired possession, Jerry Nelson was at liberty to bring an appropriate action to bar such disposition. That, however, was a part of a separate action and not properly a part of the replevin action.

Id. at 712, 386 N.W.2d at 457.

The *Arcadia* court also discussed *Blue Valley Bank v. Bane & Co.*, 20 Neb. 294, 30 N.W. 64 (1886), in which the general owner of a stock of goods was in default on a debt in favor of Blue Valley Bank, which held two chattel mortgages on the goods. In order to foreclose the mortgages, Blue Valley seized and took possession of the goods. At about this time, several general creditors of the owner issued writs of attachment in efforts to levy upon the same goods. The trial court entered a judgment of possession in favor of Blue Valley, but found that the replevied goods had a value in excess of the debt the owner owed Blue Valley and entered judgment for the other creditors in that amount. On appeal, this court affirmed the ruling that Blue Valley was entitled to possession, but reversed the portion of the judgment which assessed damages against Blue Valley and in favor of the other creditors for the surplus funds. In so doing, the *Blue Valley* court stated at 299, 30 N.W. at 67:

> The action of replevin, or, as it is, I think, more appropriately termed in our state, the action for the delivery of personal property, is a statutory action, every proceeding in which is specially provided for by statute. It cannot be changed into a suit in equity, nor into one for money had and received; neither does off-set or counter-claim lie against it.

Thus, the issue in a replevin action is not ownership of the property, but the right to immediate possession at the time of the commencement of the action, and, as a general rule, all matters foreign to the issue of possession must be excluded from consideration and are not available as defenses. Accord, e.g., *Dubied Machinery Co. v. Vermont Knitting Co., Inc.*, 739 F. Supp. 867 (S.D.N.Y. 1990) (counterclaims relating to item not replevied could not serve as a defense to replevy of another item); *Faulkner v. Marineland, Inc.*, 18 Conn. App. 1, 555 A.2d 1001 (1989) (claims for storage fees and interest not arising out of replevy not recoverable); *Ford Motor Credit Co. v. Caiazzo*, 387 Pa. Super. 561, 564 A.2d 931 (1989) (breach of warranty defense, as well as counterclaims for return of purchase price paid and defamation damages, not proper defenses to replevin action).

Consequently, the only matters properly at issue in this case were whether the Barelmanns were indebted to the bank and, if so, whether the bank possessed a valid lien on the property it seized. On those issues the district court granted the bank's motion for summary judgment.

At this juncture it is well to recall that summary judgment is properly granted only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue concerning any material fact or as to the ultimate inferences deducible from such facts and that the moving party is entitled to judgment as a matter of law. *Flamme v. Wolf Ins. Agency*, *ante* p. 465, 476 N.W.2d 802 (1991), citing *Krohn v. Gardner*, 238 Neb. 460, 471 N.W.2d 391 (1991). Once the movant has established facts entitling him to summary judgment, the nonmovant has the burden of "presenting evidence to show an issue of material fact which prevents a judgment as a matter of law." *A.G.A. Inc. v. First*

Nat. Bank, ante p. 74, 75, 474 N.W.2d 655, 656 (1991). On appeal, it is this court's duty to review the evidence in a light most favorable to the party against whom the judgment was granted and give such party the benefit of all reasonable inferences deducible from the evidence. *Id.*

(a) Existence of Debt

The existence of the Barelmanns' debt is evidenced by the notes described in part II. These notes are negotiable instruments. See Neb. U.C.C. § 3-104 (Reissue 1980). According to Neb. U.C.C. § 3-307(2) (Reissue 1980), "[w]hen signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense."

As the Barelmanns admittedly signed the two notes in question, they could successfully defend this aspect of the matter only by showing either that these notes were invalid or that they had been paid.

The promissory note executed on April 19, 1985, recites that its purpose was to "Renew Operating Notes and Int[erest]." Inasmuch as no consideration is necessary for an instrument given as security for a debt already owed by the party giving it, it would appear that as of April 19, 1985, the Barelmanns were indebted to the bank. See, *First Nat. Bank of Omaha v. Kizzier*, 202 Neb. 369, 275 N.W.2d 600 (1979); Neb. U.C.C. § 3-408 (Reissue 1980).

However, the Barelmanns allege that Sharon Barelmann was not a party to the original note creating the indebtedness represented by the April 19 note, and, thus, the April 19 note is not valid as to her. This claim overlooks that the bank's agreement to refinance the loan would, in and of itself, be consideration, as there are no facts pled which show that the bank was under any obligation to agree to refinance the note originally executed by Russell Barelmann. In *Hecker v. Ravenna Bank*, 237 Neb. 810, 815, 468 N.W.2d 88, 93 (1991), quoting *Buckingham v. Wray*, 219 Neb. 807, 366 N.W.2d 753 (1985), we stated:

> "[C]onsideration is sufficient to support a contract if there is any detriment to the promisee or benefit to the

> promisor. Generally, a court will not inquire into the adequacy of consideration for a contract, inasmuch as consideration based on value of property or performance of a promise is a matter of personal judgment by parties to a contract. Ordinarily, a contract will not be held invalid for inadequacy of consideration alone, unless inadequacy is so great as to furnish of itself evidence of fraud."

The promissory note executed on April 22, 1985, recites it covered fuel, hog feed, and expenses. There being no evidence it was not so issued, the document itself supports the conclusion that the consideration for its issuance was the advancement of $2,500 for the designated farm expenses.

There being no proof that the notes in question were paid off or otherwise discharged or that they were executed as the result of some fraud or other deceit practiced by the bank, the district court properly determined that the Barelmanns were indebted to the bank.

(b) Existence of a Lien

The existence of the lien is evidenced by the signed financing statement and security agreement dated April 19, 1985.

Neb. U.C.C. § 9-203 (Reissue 1980) provides three basic prerequisites to the existence of a security interest: agreement, value, and collateral. In addition, the agreement must be in writing. The Barelmanns admitted that the signatures on the April 1985 financing statement and security agreement were theirs. Therefore, the requirement of a written agreement is satisfied. They do not claim that they did not own the property given as collateral for the security agreement. Therefore, the only remaining issue is whether value was given for the security agreement.

The definition for value is found in Neb. U.C.C. § 1-201(44) (Reissue 1980): "Except as otherwise provided with respect to negotiable instruments and bank collections . . . a person gives 'value' for rights if he acquires them . . . (d) generally, in return for any consideration sufficient to support a simple contract." The determination that there was valid consideration to support the questioned promissory notes necessarily means that the bank gave value for the security agreement.

Neb. U.C.C. § 9-402 (Reissue 1980) provides, in relevant part:

> A financing statement is sufficient if it gives the names of the debtor and the secured party, is signed by the debtor, gives an address of the secured party . . . gives a mailing address of the debtor and contains a statement indicating the types, or describing the items, of collateral.

The Barelmanns do not plead any facts refuting the existence of any of these requirements. However, Russell Barelmann questions the adequacy of the financing statement, claiming that it does not include, by attachment or otherwise, a list of the equipment and machinery pledged. This position overlooks that the financing statement creates a security interest in

> the following collateral, whether now owned or hereafter acquired: all equipment, all farm products, including but not limited to crops, livestock, supplies used or produced in farming operations, all contract rights and accounts, and in additions, accessions, substitutions thereto, and all products and proceeds thereof, including but not limited to those used in or arising from farming and ranching and dairy operation.

In addition, the financing statement, as required by § 9-402, describes the real estate on which the crops were to be grown.

Neb. U.C.C. § 9-110 (Reissue 1980) provides: "For the purposes of this article any description of personal property or real estate is sufficient whether or not it is specific if it reasonably identifies what is described." In addition, § 9-402(8) provides: "A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading."

In *North Platte State Bank v. Production Credit Assn.*, 189 Neb. 44, 55-56, 200 N.W.2d 1, 8 (1972), this court stated:

> "The fundamental purpose of Art. 9 of the code is to make the process of perfecting a security interest easy, simple, and certain. . . . The code very simply and briefly provides for a notice-filing procedure with a minimum of information required to be publicized in a filed financing statement. All that is required is a minimal description, and it may be by type or kind. The statement need not

> necessarily contain detail as to collateral, nor any statement of quantity, size, description or specifications . . . ."

Thus, the financing statement adequately describes the collateral which is the subject of the security interest. The description is such as to put a reasonably prudent person on notice as to which property was covered by a security agreement, thereby fulfilling the purpose of supplying in the financing statement a description of the collateral. Therefore, the assertion in Russell Barelmann's affidavit that no itemized list of the collateral was attached to the financing statement is of no relevance. The district court therefore correctly determined that the bank possessed a valid lien on the property the Barelmanns pledged as collateral for money they obtained from the bank.

As we have seen from the analysis of the nature of a replevin action, once it was determined that the Barelmanns were indebted to the bank and that the bank possessed a valid lien on the property it sought to replevy, there was nothing left to try.

That being so, the district court could not have committed prejudicial error by directing a verdict in favor of the bank at the close of the Barelmanns' evidence, nor could it have committed prejudicial error by any of its evidential rulings at that trial.

3. Bond Cost

Remaining for consideration in this case is the Barelmanns' contention that the district court erred in taxing against them as a cost of suit the premium the bank paid for the replevin bond it posted, as required by § 25-1098, when the replevied property was delivered to it by the sheriff.

Neb. Rev. Stat. § 25-10,105 (Reissue 1989) provides:

> In all cases when the property has been delivered to the plaintiff, where the jury shall find for the plaintiff, on an issue joined, or on inquiry of damages upon a judgment by default, they shall assess adequate damages to the plaintiff for the illegal detention of the property; for which with costs of suit, the court shall render judgment for plaintiff.

The Barelmanns argue first that § 25-10,105 does not apply because there was no finding they illegally detained the property in question and because there was neither a jury finding nor default judgment against them. Obviously, the first claim is without merit, for the replevin judgment in favor of the bank is a finding that the Barelmanns illegally detained the subject property.

As to whether a successful plaintiff may in all circumstances recover the costs of suit, the statute is admittedly less than artfully drawn. But we need not at this time decide whether its language compels the absurd result the Barelmanns espouse, for the bank is entitled to recovery of its costs in this action without reference to § 25-10,105.

Neb. Rev. Stat. § 25-1708 (Reissue 1989) provides: "Where it is not otherwise provided by this and other statutes, costs shall be allowed of course to the plaintiff, upon a judgment in his favor, in actions for the recovery of . . . specific real or personal property." Therefore, the only real issue raised by the Barelmanns' assignment of error is whether, as the bond was posted for their protection, the cost of its purchase may be taxed against them. Although this is a question of first impression for us, other jurisdictions have found that the cost of a replevin bond is correctly taxed to an unsuccessful defendant.

The plaintiff in *Crowe v. Peaslee-Gaulbert Co.*, 37 F.2d 216 (1st Cir. 1930), filed a replevin action. Massachusetts law required such a plaintiff to post a bond in an amount double the value of the goods. In upholding the assessment of the bond premium as a taxable cost to the unsuccessful defendant, the U.S. Circuit Court of Appeals for the First Circuit stated:

> Under modern conditions and practice, bonds by surety companies have come to be the accepted and approved custom where bonds are required; and where the giving of the bond is compulsory, whether by order of court or by statute, the rule as to costs, in reason and authority, requires that premiums on such bonds are properly included in a bill of costs of the successful party.

Id. at 218.

The replevin plaintiff in *Deere Co. v. Cerone Equip. Co.*, 33

A.D.2d 257, 307 N.Y.S.2d 129 (1970), moved for summary judgment and included in the proposed bill of costs the bond premium. The trial court granted the summary judgment but rejected as a taxable cost the bond premium. The appellate court modified the trial court's judgment so as to allow the plaintiff to recover the bond premium as a taxable cost of the action. In doing so, the appellate court noted that not only was the plaintiff required to provide the bond in order to gain possession, but also that the defendant interposed no meritorious defense.

We conclude that a successful plaintiff in replevin is entitled to recover the reasonable cost of the bond required of it by § 25-1098.

IV. ANALYSIS OF MISCONDUCT SUIT
(CASE NO. 89-1383)

In this case the Barelmanns assign as errors, in summary, the district court's refusal to receive certain exhibits in evidence and its grant of summary judgment in favor of the appellees on the Barelmanns' causes of action for tortious conversion and trespass.

The matter of the exhibits is easily resolved, for they were not, as required by Neb. Rev. Stat. § 25-1332 (Reissue 1989), served by the day prior to the hearing. See *Center Bank v. Mid-Continent Meats, Inc.*, 194 Neb. 665, 234 N.W.2d 902 (1975).

We thus turn our attention to whether the summary judgment was properly granted under the standards reviewed in part III(2).

1. CONVERSION

With respect to their conversion claim, the Barelmanns allege that the property seized but not listed in the replevin order was tortiously converted. Tortious conversion is "any distinct act of dominion wrongfully asserted over another's property in denial of or inconsistent with that person's rights." *PWA Farms v. North Platte State Bank*, 220 Neb. 516, 519, 371 N.W.2d 102, 105 (1985). In order for the cause of action to arise, the tort-feasor must have assumed and exercised "the right of ownership over goods or chattels belonging to another . . . ."

Terra Western Corp. v. Berry and Co., 207 Neb. 28, 31, 295 N.W.2d 693, 696 (1980). Hence, a plaintiff in conversion must show (1) an immediate right to possession of the property and (2) its wrongful possession by the tort-feasor. *Id.*

Even if we assume for the purposes of this analysis that the appellees seized property not listed in the replevin order, the Barelmanns cannot satisfy the first element of the cause of action.

As determined in part III(2), the bank has a superior immediate right to possession of the property. The financing statement and security agreement the Barelmanns signed gave the bank a security interest in all of the Barelmanns' equipment and cattle, and further provides:

> Upon . . . default . . . [the bank] may declare all Obligations secured hereby immediately due and payable and shall have the remedies of a secured party under the Nebraska Uniform Commercial Code. [The bank] may require [the Barelmanns] to assemble the Collateral and deliver or make it available to [the bank] at a place to be designated by [it] which is reasonably convenient to both parties.

As noted in part II, the subject promissory notes further provide that the balance on the loans became immediately due upon default, which could be triggered without notice or demand by the filing for bankruptcy.

2. Trespass

The trespass action is predicated upon the Barelmanns' assertions that when the appellees came onto their property to execute the replevin order, they injured certain cattle.

If we assume for the purposes of this analysis that the appellees did in fact injure the cattle as claimed, the Barelmanns still cannot prevail, for they failed to prove damages.

The measure of damages for nonfatal injuries to livestock is the difference in the market value of the animal immediately before and immediately after the injury. See, *Fuchser v. Jacobson*, 205 Neb. 786, 290 N.W.2d 449 (1980); *Shotkoski v. Standard Chemical Manuf. Co.*, 195 Neb. 22, 237 N.W.2d 92 (1975).

As to the single cow said to have been crippled, there was no evidence of the difference in its value before and after the injury. Nor was there any such evidence with respect to the cattle said to have suffered a 3-percent shrinkage caused as a result of being herded and penned.

V. ANALYSIS OF DECLARATORY JUDGMENT ACTION
(CASE NO. 89-499)

In this case the Barelmanns assign five errors, which merge to effectively claim that the district court erred in dismissing the action following the sustainment of Fox's demurrer and in interfering with the preparation of the record on appeal.

Neb. Rev. Stat. § 25-21,149 (Reissue 1989) provides: "Courts of record . . . shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." In *Mullendore v. School Dist. No. 1*, 223 Neb. 28, 32-33, 388 N.W.2d 93, 97 (1986), quoting *Murphy v. Holt County Committee of Reorganization*, 181 Neb. 182, 147 N.W.2d 522 (1966), this court stated that the purpose of a declaratory judgment is to provide a " 'speedy determination of issues which would otherwise be delayed to the possible injury of the parties.' "

> The remedy of declaratory judgment may be available to a litigant when a controversy exists as a result of a claim asserted against one who has an interest in contesting such claim, the controversy is between persons whose interests are adverse, the party seeking declaratory relief has a legally protectable interest or right in the subject matter of the controversy, and the issue involved is capable of present judicial determination.

Mullendore, supra at 33, 388 N.W.2d at 98. A declaratory judgment is "preemptive justice" designed to relieve a party of uncertainty before the wrong has actually been committed or the damage suffered. *LaMarche v. State of Oregon*, 81 Or. App. 216, 725 P.2d 378 (1986). See, *Kapetanov v. Small Claims Court of Ogden*, 659 P.2d 1049 (Utah 1983); *Woodruff v. City of Laredo*, 686 S.W.2d 692 (Tex. App. 1985); *Elkins v. Vana*, 25 Ariz. App. 122, 541 P.2d 585 (1975). However, declaratory

judgments are not to be " 'entertained where another equally serviceable remedy has been provided by law,' " *Zarybnicky v. County of Gage*, 196 Neb. 210, 215, 241 N.W.2d 834, 837 (1976), or to create a new cause of action or a cumulative remedy, *Murphy, supra*.

The Barelmanns have failed for two reasons to properly bring an action for declaratory relief. First, the harm alleged had already occurred by the time the action was brought. Fox, as sheriff, had already replevied the property and turned it over to the bank. The property not listed in the replevin order has since been sold. Consequently, there is no law to interpret in order to determine the rights of the parties, as the alleged damage has been done.

Second, a declaratory judgment cannot be used to provide an alternative or cumulative remedy. See *Murphy, supra*. The Barelmanns could have brought an action in negligence against Fox for his alleged failure to follow the statutory guidelines in a replevin action. Indeed, the Barelmanns had a whole host of remedies available to them, several of which they pled but failed to establish. Notwithstanding, the Barelmanns cannot be allowed to bring an action for declaratory judgment simply because their other remedies, for one reason or another, failed or were not pursued.

On demurrer, a petition will be found sufficient if, from the statement of facts set forth in the petition, the law entitles a plaintiff to recover. *Matheson v. Stork*, *ante* p. 547, 477 N.W.2d 156 (1991).

The determination that a declaratory judgment action does not lie makes it unnecessary for us to determine at this time whether there ever may be circumstances under which a trial judge may interfere with the preparation of the record a litigant wishes to bring to the appellate courts.

VI. DECISION

For the foregoing reasons, the judgment of the district court in each case is, as first stated in part I, affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. DONALD MELTON, APPELLANT.

478 N.W.2d 341

Filed January 10, 1992. No. 90-700.

1. **Criminal Law: Weapons.** Any person who possesses any firearm with a barrel less than 18 inches in length and who has previously been convicted of a felony commits the offense of possession of firearms by a felon.
2. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous.
3. _____: _____. In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed witnesses testifying in regard to such motion.
4. **Confessions: Prosecuting Attorneys: Police Officers and Sheriffs: Proof: Self-Incrimination: Words and Phrases.** The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.
5. **Confessions.** When an accused initiates a conversation, his statements do not result from interrogation and are admissible.
6. **Miranda Rights: Search and Seizure.** The *Miranda* rules are not applicable to consent searches.
7. **Search and Seizure.** There is no requirement that a person asked to consent to a search be advised that he may refuse consent.
8. **Confessions: Evidence: Proof.** To be admissible in evidence, an accused's statement, admission, or confession must have been freely and voluntarily made. Using a preponderance of evidence standard, the trial judge makes that determination before the statement, admission, or confession is admitted into evidence.
9. _____: _____: _____. Once admitted into evidence, a defendant's statement, admission, or confession may not be considered by the fact finder as evidence of a defendant's guilt unless the fact finder first finds, beyond a reasonable doubt, that the defendant's statement, admission, or confession was freely, voluntarily, and intelligently made by the defendant.
10. _____: _____: _____. To meet the requirement that a defendant's statement, admission, or confession was made freely and voluntarily, the evidence must show that such statement, admission, or confession was not the product of any promise or inducement—direct, indirect, or implied—no matter how slight. However, this rule is not to be applied on a strict, per se basis. Rather, determinations of voluntariness are based upon an assessment of all of the circumstances and factors surrounding the making of a statement.

11. **Confessions: Intoxication: Proof.** The mere fact of intoxication is not conclusive on the issue of voluntariness of a statement or a consent given by a defendant. A defendant must be so intoxicated that he is unable to understand the meaning of his statements. If the trial judge is satisfied that under the totality of the circumstances the defendant was able to reason, comprehend, or resist, the statements are to be admitted.
12. **Criminal Law: Trial: Weapons: Evidence.** Evidence of possession of a revolver or gun of prohibited description, which is in apparently good condition and has the characteristics and appearance commonly understood to be those of the firearm it purports to be, is prima facie evidence sufficient to go to the jury in a prosecution for possession of a firearm by a felon.
13. **Statutes: Presumptions: Legislature: Intent: Appeal and Error.** In construing a statute, it is presumed that the Legislature intended sensible, rather than absurd, results. The Supreme Court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.
14. **Trial: Evidence: Appeal and Error.** Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted or admitted without objection, supports the finding by the trier of fact.

Appeal from the District Court for Fillmore County: ORVILLE L. COADY, Judge. Affirmed.

Richard A. Koehler for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Claiming that the trial court erred (1) in admitting into evidence a .45-caliber pistol found in his home and (2) in failing to require the State to prove every element of the offense charged, Donald Melton appeals his conviction of possession of a firearm by a felon.

Neb. Rev. Stat. § 28-1206 (Reissue 1989) provides in relevant part that "[a]ny person who possesses any firearm with a barrel less than eighteen inches in length . . . and who has previously been convicted of a felony . . . commits the offense of possession of firearms by a felon . . . ." The offense is a Class IV felony and carries a penalty of up to 5 years' imprisonment, up to a $10,000 fine, or both. Melton does not contest the

documentary proof that he was a convicted felon at the time of the alleged crime.

The defendant was sentenced to 254 days in the Fillmore County jail. Melton was given credit on his sentence for the time he spent in jail awaiting final disposition of his case. We affirm.

In his first assignment of error, Melton claims that the .45-caliber pistol admitted into evidence was the product or fruit of an illegal search and seizure. Melton argues (1) that the pistol was seized as a result of statements made by him, although he had not been advised of his *Miranda* rights, and (2) that the statements made by him were not the product of a free will and rational intellect because he was intoxicated and mentally ill at the time the statements were made.

At approximately 10:30 a.m. on December 10, 1989, Geneva police officer John Zelenka, while in uniform and on patrol, received a radio message to meet a visitor at the back door of the Fillmore County sheriff's office. Upon the officer's arrival there, Zelenka met the defendant. Melton asked Zelenka if a police officer in Exeter, Nebraska, had had a problem the previous night. Zelenka replied that he did not know and asked Melton to explain what he meant. Melton told Zelenka that he had taken three or four shots at Officer Curt Callahan's car or residence in Exeter the previous night. Zelenka and Melton then entered the sheriff's office.

Inside the sheriff's office, Zelenka asked Melton what time the shooting incident occurred, and Melton told Zelenka that it took place around 4 or 4:15 a.m. Zelenka asked Melton the location of the gun that he had used, and Melton answered that the gun was under the stove in the kitchen at his home and that his residence was at 311 South 13th Street. Zelenka testified, "I had asked him [Melton] if we could retrieve the gun from his residence and he said, yes, we could."

Zelenka called Deputy Sheriff Steven Roemmich for assistance and then, by telephone, talked to Callahan to find out if something had happened in Exeter the previous night. When Roemmich arrived at the sheriff's office, he too talked with the defendant. Melton told Deputy Roemmich that he had been in Exeter and had shot Officer Callahan's trailer with a

.45-caliber pistol. The defendant was not under arrest when he made that statement. The deputy testified that while Melton was in the sheriff's office "he stated if we want the weapon we could get to his residence and get the weapon." Thereafter, the two officers and Melton proceeded to a deputy's office in the back of the sheriff's office. At that point, Melton said he was going back to Exeter to "get" the police officer there and said he wanted to go to the regional center. Roemmich told Melton he should not say anything because he and Zelenka were police officers, but Melton voluntarily kept talking. Roemmich told Melton that he had the right to remain silent, but the defendant retorted, "I know my rights, you don't have to tell me my rights." Melton threatened that "if you don't take me to the Regional Center, I am going to go back and I will get the police officer because I tried to call him out last night and he didn't come out and this time I will get him."

Knowing that the regional center at Hastings, Nebraska, would not admit persons who were intoxicated, Deputy Roemmich administered a breath alcohol test, which revealed that Melton had a breath alcohol level of .158 percent. At the time of the test, the defendant was in emergency protective custody because he had been involved with a firearm and had been making threats toward another person. Roemmich testified he wanted Melton's gun so the defendant would not "go back out and . . . do some other stuff with it that he said he had already done." Melton was placed in a jail cell in order to detoxify him prior to his being taken to the regional center.

Deputy Roemmich approached Melton in his cell and told the defendant that he would have to have the defendant sign a permission to search form before he would go to his house and get the gun to which the defendant had referred. Melton replied that the deputy should just go to the residence and get the gun. Roemmich told Melton that he would not go to Melton's house unless the defendant signed the permission form. Melton signed the form.

Deputy Roemmich and Officer Zelenka then found Ronald Melton, the twin brother of Donald Melton, with whom the defendant shared a home at 311 South 13th Street in Geneva, Nebraska. The officers told Ronald that the defendant had

given them permission to go to his home and pick up a gun. Ronald Melton testified that as a resident of the house he had access to its kitchen. He voluntarily gave the officers permission to enter the home. It was Ronald who retrieved the pistol from under the stove and gave it to the officers. The barrel of the gun measured $6^{11}/_{16}$ inches in length. The gun had six shells in the cylinder, four of which had been spent. The other two shells in the cylinder were live rounds.

Deputy Roemmich signed an emergency admittance form for the defendant's admittance to the regional center. It stated in relevant part:

> I have personally observed this individual [Donald Melton] *or* I have been informed by Donald Melton Personally who is a reliable person, that this individual is a mentally ill dangerous person and that he or she presents . . . [a] substantial risk of serious harm to another person or persons within the near future, as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm . . . and that the harm described is in my opinion likely to occur before Mental Health Board proceedings can be invoked.

(Emphasis supplied.)

The next day, Melton was taken to the Hastings Regional Center.

There is no evidence in the record that Melton was ever determined to be mentally ill on December 10, 1989.

The defendant unsuccessfully moved to suppress the statements he made at the sheriff's office, the written permission to search form, and the gun. At the bench trial that followed, the statements, the permission to search form, and the gun were all admitted into evidence, over objections by the defendant. On appeal, the only suppression issue raised by Melton is whether the trial court erred in failing to suppress the .45-caliber pistol found in his home. Melton claims the pistol was the product or fruit of an illegal search and seizure.

In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Tingle*, *ante* p. 558, 477 N.W.2d 544

(1991). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court does not reweigh the evidence or resolve conflicts in the evidence, but, rather, recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed witnesses testifying in regard to such motion. *Id.*

Melton argues that the statements he made to law enforcement officers at the sheriff's office were the result of an unlawful custodial interrogation. The U.S. Supreme Court, in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), held that the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. Custodial interrogation means questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. See *id.* See, also, *State v. Melton, ante* p. 506, 476 N.W.2d 842 (1991). Melton complains that law enforcement officers should have advised him that he could refuse to consent to a search. We have held that the *Miranda* rules are not applicable to consent searches, see, *State v. Packett*, 207 Neb. 202, 297 N.W.2d 762 (1980), and *State v. Clouse*, 195 Neb. 671, 240 N.W.2d 36 (1976), and that there is no requirement that a person asked to consent to a search be advised that he may refuse consent, see, *State v. Packett, supra*, and *State v. Wood*, 195 Neb. 353, 238 N.W.2d 226 (1976).

The facts here do not support Melton's contention that his statements were the result of an improper custodial interrogation. The trial court found that the defendant was not under arrest when he went to the back door of the sheriff's office and told Officer Zelenka that he had shot at Officer Callahan's car or residence in Exeter, Nebraska, the previous night. Nor was Melton in custody when he told the officers the type of gun he had fired in Exeter and where it could be found. Since Melton was not in custody, it was not necessary for law enforcement officers to give him *Miranda* warnings concerning his right to remain silent, his right to counsel, and his privilege against self-incrimination. Moreover, when an accused initiates

a conversation, his statements do not result from interrogation and are admissible. *United States v. Perkins*, 608 F.2d 1064 (5th Cir. 1979). See *State v. Lamb*, 213 Neb. 498, 330 N.W.2d 462 (1983). Clearly, Melton initiated the conversations with Officer Zelenka and Deputy Roemmich.

Melton also claims that his statements to law enforcement officers were not the product of a "free will and rational intellect" because he was intoxicated and mentally ill at the time he made the statements. Brief for appellant at 6. The trial court found that Melton's statements were voluntary and that he knew what he was saying.

" '[T]o be admissible in evidence, an accused's statement, admission, or confession must have been freely and voluntarily made . . . .' " *State v. Porter*, 235 Neb. 476, 480, 455 N.W.2d 787, 792 (1990). Using a preponderance of evidence standard, the trial judge makes that determination before the statement, admission, or confession is admitted into evidence. See *id.* Once admitted into evidence, a defendant's statement, admission, or confession may not be considered by the fact finder as evidence of a defendant's guilt unless the fact finder first finds, beyond a reasonable doubt, that the defendant's statement, admission, or confession was freely, voluntarily, and intelligently made by the defendant. See *State v. Irwin*, 191 Neb. 169, 214 N.W.2d 595 (1974). Determinations of voluntariness are based upon an assessment of all of the circumstances and factors surrounding the making of a statement. *State v. Haynie*, *ante* p. 478, 476 N.W.2d 905 (1991).

To meet the requirement that a defendant's statement, admission, or confession was made freely and voluntarily, the evidence must show that such statement, admission, or confession was not the product of any promise or inducement—direct, indirect, or implied—no matter how slight. However, this rule is not to be applied on a strict, per se basis. Rather, determinations of voluntariness are based upon an assessment of all of the circumstances and factors surrounding the occurrence when the statement is made. *Id.*

There is no evidence in the record, nor is there any contention by Melton, that any of his statements are the product of or were extracted by any direct, indirect, or implied promise or

inducement.

There is evidence of Melton's intoxication at the time he talked with Officer Zelenka and Deputy Roemmich. The mere fact of intoxication is not conclusive on the issue of voluntariness of a statement or a consent given by a defendant. See *State v. Lamb, supra.* A defendant must be so intoxicated that he is unable to understand the meaning of his statements. If the trial judge is satisfied that under the totality of the circumstances the defendant was able to reason, comprehend, or resist, the statements are to be admitted. *Id.* In *Lamb*, the defendant's blood alcohol level was at .224 percent 10 minutes after he had made incriminating statements to police officers. Lamb's statements were properly admitted in evidence. *Id.* Despite the fact that Melton's breath tested .158 percent alcohol, the evidence in Melton's case supports the trial court's finding that Melton understood the meaning of his statements. The defendant sought out a police officer concerning his own activities of the previous night. The defendant accurately related the events of the previous night, when he fired three or four shots at property owned by Officer Callahan. He knew that Callahan was a peace officer. Melton related his motive for shooting at Callahan's property: "[N]obody shoots at my brother and gets away with it." Melton declared that if he was not taken to the regional center, he planned to go back to Exeter to "get" Callahan. The defendant knew, and voluntarily told the officers, not only the location of his gun but also the caliber and type of gun that he had used in Exeter. The defendant knew he had the right to remain silent in the presence of law enforcement officers. From these facts, a trial judge could properly conclude that at the time Melton made his statements and orally gave law enforcement officers permission to search his home he was able to reason, understand, and comprehend the statements he made to both Zelenka and Roemmich.

Melton also claims that his statements were involuntary because he was mentally ill. At best, the evidence is in conflict. It is true that Deputy Roemmich, as required by Neb. Rev. Stat. § 83-1021 (Reissue 1987), signed a form (not under oath) to admit Melton to the regional center and that the defendant was taken there the day after he had made the statements to law

enforcement officers. However, when Roemmich was under oath at trial, he testified, "I didn't think he [Melton] was mentally ill." From the evidence, without being clearly wrong, a fact finder could find there was no evidence that Melton was in fact mentally ill when he made his statements to law enforcement officers.

The statements made by the defendant and the circumstances surrounding his making them provide sufficient indicia of Melton's ability to understand, to reason, and to comprehend, for the trial judge to have found that the statements were the product of a free will and rational intellect.

Whether Melton's written permission for law enforcement officers to search his home is invalid because the defendant was in custody when the written consent to search was given, as Melton argues, is of no significance at this point. The written consent to search was merely cumulative to Melton's oral consent to search. The evidence is uncontroverted that Melton, while he was not in custody, not only orally consented but, indeed, orally invited Deputy Roemmich to search his home and seize his .45-caliber pistol. That consent and invitation had never been revoked. They remained valid throughout the search for, and seizure of, the .45-caliber pistol.

Under all of the circumstances of this case, it cannot be said that the trial court was clearly wrong in not suppressing Melton's statements or the pistol, which the evidence showed was in his possession. Melton's first assignment of error is without merit.

In his second assignment of error, the defendant claims that the trial court did not hold the prosecution to its burden of proving every element of the crime charged. Melton argues that the trial court failed to require the State to prove that the .45-caliber pistol retrieved from his home was a firearm.

The evidence reflects that Melton, a convicted felon, admitted having in his possession and firing a .45-caliber pistol which could be found under the stove in the kitchen of his house. The pistol was found where Melton said it could be found. It had a barrel $6^{11}/_{16}$ inches long and had been fired four times, just as Melton had volunteered to law enforcement officers. Independent evidence reflected that the defendant had

purchased the pistol from his former employer.

We determined in *State v. Lee*, 195 Neb. 348, 237 N.W.2d 880 (1976), that evidence of possession of a revolver or gun of prohibited description, which is in apparently good condition and has the characteristics and appearance commonly understood to be those of the firearm it purports to be, is prima facie evidence sufficient to go to the jury in a prosecution for possession of a firearm by a felon. The evidence herein meets this standard. The evidence shows that the pistol had been fired four times the previous night.

The defendant argues that since the term "firearm" is not specifically defined in the Nebraska statutes, it was error to presume that the pistol is a firearm. In construing a statute, it is presumed that the Legislature intended sensible, rather than absurd, results. The Supreme Court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *State v. Heckman, ante* p. 25, 473 N.W.2d 416 (1991). Clearly, a pistol is a "firearm" as used in § 28-1206.

Melton's second assignment of error is also without merit.

Even if the .45-caliber pistol was illegally seized and improperly admitted into evidence and even if Melton's statements were suppressed, there is still overwhelming independent evidence of the his guilt of being a felon in possession of a prohibited firearm. The State's documentary evidence that the defendant was a convicted felon at all relevant times in this case is uncontroverted.

The independent evidence is uncontroverted that during the period charged in the information the defendant purchased a .45-caliber pistol for $250 from his former employer. The purchase was made at the former employer's place of business, a service station in Fillmore County. The former employer testified that on the day Melton bought the gun from him, the defendant took possession of it and walked out the door with it. There was no objection to this evidence. Thus, the testimony concerning the search of Melton's house and the seizure of his .45-caliber pistol was cumulative to other relevant and properly admitted evidence of Melton's possession of a .45-caliber pistol at the time alleged in the information. That evidence supports

the court's finding that Melton was in possession of a firearm as charged. " 'Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection, supports the finding by the trier of fact.' " *State v. Coleman*, *post* p. 800, 814-15, 478 N.W.2d 349, 358 (1992); *State v. Cox*, 231 Neb. 495, 437 N.W.2d 134 (1989).

With or without Melton's .45-caliber pistol or his statements being admitted in evidence, there is overwhelming evidence that Melton is guilty of being a felon in possession of a firearm.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. ANTHONY W. COLEMAN, APPELLANT.

478 N.W.2d 349

Filed January 10, 1992. No. 90-728.

1. **Police Officers and Sheriffs: Arrests: Probable Cause.** When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant.
2. **Police Officers and Sheriffs: Arrests: Motor Vehicles: Search and Seizure.** When a law enforcement officer has made a lawful custodial arrest of an automobile's occupant, the officer may, as a contemporaneous incident of that arrest, search the automobile's passenger compartment and examine contents of any container, whether open or closed, within the passenger compartment.
3. **Police Officers and Sheriffs: Motor Vehicles: Search and Seizure.** An inventory search of an automobile impounded by police protects the automobile owner's property while in police custody, protects police against claims or disputes over lost or stolen property, and protects police from potential danger; hence, inventories pursuant to standard police procedures are reasonable.
4. **Constitutional Law: Search and Seizure: Search Warrants: Evidence.** Inventory searches are a well-defined exception to the warrant requirement for a search; therefore, evidence discovered during a proper inventory search is constitutionally admissible.
5. **Trial: Evidence: Juries.** A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury.

6. **Trial: Evidence: Appeal and Error.** Because overruling a motion in limine is not a final ruling on admissibility of evidence and, therefore, does not present a question for appellate review, a question concerning admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection to the evidence during trial.
7. _____: _____: _____. An appellant claiming reversible error as the result of admission of evidence must have made a timely objection, stating the specific ground of objection if a specific ground was not apparent from the context.
8. **Trial: Evidence.** One function of a proper objection is to direct the court's attention to questioned admissibility of particular evidence so that the court may intelligently, quickly, and correctly rule on the reception or exclusion of evidence.
9. **Rules of Evidence: Words and Phrases.** Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
10. **Evidence.** To be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving an issue to be decided.
11. **Criminal Law: Trial: Juries: Evidence: Appeal and Error.** In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt.
12. **Criminal Law: Trial: Evidence: Convictions: Appeal and Error.** In the trial of a criminal case, erroneous admission of evidence which is not cumulative may constitute harmless error beyond a reasonable doubt, when a defendant's conviction is supported by overwhelming evidence which has been properly admitted or admitted without objection.

Appeal from the District Court for Douglas County: JOHN E. CLARK, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Don Stenberg, Attorney General, and Jim Elworth for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

As the result of a jury trial, Anthony W. Coleman was convicted of possessing a controlled substance, "crack" cocaine, in violation of Neb. Rev. Stat. § 28-416(3) (Reissue

1989). In his pretrial motion to suppress the cocaine as physical evidence, see Neb. Rev. Stat. § 29-822 (Reissue 1989) (suppression of physical evidence obtained by unlawful search and seizure), Coleman claimed that the cocaine evidence was obtained through a warrantless and, contrary to the fourth amendment to the U.S. Constitution and article 1, § 7, of the Nebraska Constitution, an unreasonable search of an automobile in which Coleman was a passenger. After the district court overruled the suppression motion, Coleman objected to the cocaine as evidence at his trial and again raised the question concerning constitutional admissibility of the cocaine. Also, by a motion in limine, which was rejected by the district court, and a subsequent objection overruled during trial, Coleman sought to prevent the State's introducing in its case in chief testimony about Coleman's incarceration shortly before his arrest on the cocaine charge.

THE SEARCH AND COLEMAN'S STATEMENT

The Search.

Around 9 p.m. on November 29, 1989, Officers Mark Lang and James Morgan of the Omaha Police Division were on a routine cruiser patrol northbound on 34th Avenue in Omaha when they observed a Buick Regal make an erratic turn from an east-west street onto 34th Avenue, cross the centerline of 34th Avenue, proceed astraddle the centerline toward the officers' cruiser in the northbound lane, and then continue southbound away from the cruiser. When the Buick crossed the centerline, "nearly colliding" with the cruiser, Officer Lang, who was driving the cruiser, had to "swerve to the right hand of the roadway to avoid collision with the [Buick]." Officer Lang turned the cruiser around, activated the cruiser's "overhead lights," and followed the Buick a short distance until the Buick pulled to the curb and the officers made a "traffic stop." There were three occupants in the Buick.

Officer Lang went to the driver's side of the Buick, where he contacted the driver, later identified as Ronald Branch. Officer Morgan was standing at the Buick's right rear quarter panel. Lang asked Branch "for his operator's license and the paper work for the vehicle." At that point, Lang smelled a "strong

odor of marijuana smoke" coming from inside the Buick and noticed that Branch "seemed a little bit hesitant and nervous at the time." When Branch was unable to produce an operator's license, he stated that his license might have been suspended.

After Lang smelled marijuana smoke and as a result of Branch's inability to produce an operator's license, Lang asked Branch to get out of the vehicle and performed a pat-down search of Branch for weapons. During Lang's inquiry concerning the marijuana odor, Branch stated that there was a "marijuana joint" in the car's ashtray and then pointed out the ashtray and joint to Lang.

During Lang's exchange with Branch, Officer Morgan asked that the passenger in the right front seat, subsequently identified as Jack Coleman, get out of the car, and conducted a pat-down search for weapons "for our own safety, beings that we were somewhat outnumbered." After searching Jack Coleman, Morgan asked the passenger seated in the right rear seat and thereafter identified as Anthony Coleman to step out of the car and contemporaneously instructed Jack Coleman to get into the back seat. Jack Coleman refused to enter the Buick and explained that his refusal was based on the fact that the police had not yet searched the area of the Buick's back seat.

As the result of a records check while at the scene, the officers learned that there was an active misdemeanor warrant for Branch's arrest and that his driver's license was under suspension. The officers then arrested Branch and, pursuant to that arrest, searched the Buick's back seat in conjunction with a standard "inventory search" of the Buick impounded on account of Branch's arrest. During the search of the Buick's rear seat area and immediately in front of the back seat which had been previously occupied by Anthony Coleman, Lang looked into "the rear ashtray that's mounted on the back of the front passenger's seat" and discovered a clear plastic baggie which contained "rocks of crack cocaine." Later, laboratory analysis verified that the contents of the baggie were "pieces of rock compound . . . identified as cocaine . . . the base form of cocaine, which is referred to as crack." In crack cocaine, "the hydrochloride portion of the [cocaine] molecule has been stripped away," leaving "close to 100 percent" purity of the

cocaine residue.

As a result of the search, the officers also arrested Jack Coleman and Anthony Coleman, who were transported to police headquarters with Branch.

At Police Headquarters.

As reflected in Lang's testimony at the suppression hearing, preparatory to interrogation at police headquarters, Lang administered the *Miranda* warning or admonition to Anthony Coleman. Lang then asked Coleman if he had any knowledge concerning the crack cocaine found in the Buick driven by Branch. At first, Coleman denied any knowledge of the cocaine. However, about 10 minutes into the interrogation, when Lang asked whether it was possible that either Branch or Jack Coleman placed the crack cocaine in the Buick's rear ashtray, Coleman, referring to the cocaine, said, "[I]t's mine," and further stated that he was "not going to play no games, you know, I'm an user, so you can go tell those other guys I fessed up." According to Lang, Coleman also stated that

> he [Coleman] had purchased the crack cocaine. He stated that his intentions were to use it, not to sell it, that he had just gotten out of the penitentiary . . . on the 19th of September [1989], and that he had heard that crack cocaine was a new thing and that it was a new thing to do.
>
> He stated that he had become scared during the traffic stop and had placed the crack cocaine in the ashtray, and the reason that he stated that he was admitting it was . . . that he didn't want to get Mr. Branch or his nephew, Mr. Jack Coleman, in trouble.

COLEMAN'S TRIAL

As previously mentioned, the trial court denied Coleman's pretrial motion to suppress the crack cocaine as evidence in Coleman's jury trial. Through a motion in limine, Coleman's lawyer asked for exclusion of certain statements which Coleman made during interrogation by Lang, namely:

> I would move in limine prior to any evidence put on by the officers to ask the court to exclude a statement that Officer Lang says that Mr. Coleman made to him with regards to the fact that he had gotten out of the

> penitentiary in September, September 19th of 1989, and then started using crack shortly afterwards.
>
> While it may be relevant, I think that its possible prejudicial value under Nebraska Revised Statutes Rule 403 would be too much for a jury to put out of their mind.
>
> . . . [M]y concern is the statement the officer makes saying, I got out of the penitentiary.

Thus, Coleman's motion in limine was based on Neb. Evid. R. 403, Neb. Rev. Stat. § 27-403 (Reissue 1989), which provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The trial court rejected Coleman's motion in limine and additionally commented that denial of the motion was "with the understanding [Coleman] is going to testify. Should that status change, then I might change my mind on the motion in limine also."

During the State's case in chief, and after Coleman's renewed objection that the seized crack cocaine, as previously challenged by the suppression motion, was constitutionally inadmissible, Lang testified that during interrogation of Coleman regarding the cocaine discovered in the Buick, Coleman said, "[I]t's mine. . . . I'm an user, so you can go tell those other guys [Branch and Jack Coleman] I fessed up." Concerning the cocaine discovered during the traffic stop, Lang's testimony also included Coleman's statements expressed during interrogation at police headquarters and previously recounted at the suppression hearing. The prosecutor then asked Lang whether Coleman had said anything else during the interrogation. To the preceding inquiry, Coleman's lawyer responded: "I object to any testimony regarding where Mr. Coleman was earlier in the fall prior to his arrest in November of 1989." After Coleman's objection was overruled, Lang testified: "[Coleman] had stated he had just gotten out of the penitentiary on the 19th of September [1989], and that he had heard that crack cocaine was a new thing and that it was a new thing to do."

ASSIGNMENTS OF ERROR

Coleman's assignments of error may be distilled into the following: (1) The police officers' stopping the vehicle in which Coleman was riding was constitutionally unauthorized, and therefore, the cocaine discovered by the officers during that stop should have been suppressed as constitutionally inadmissible evidence obtained through an unreasonable search and seizure, and (2) the district court erred in allowing Lang "to testify that the Defendant had just been released from the penitentiary." Brief for appellant at 13.

CONSTITUTIONALITY OF THE STOP

Standard of Review.

> In determining the correctness of a trial court's ruling on a motion to suppress, the Supreme Court will uphold the trial court's findings of fact unless those findings are clearly erroneous. *State v. Blakely*, 227 Neb. 816, 420 N.W.2d 300 (1988). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, the Supreme Court recognizes the trial court as the "trier of fact" and takes into consideration that the trial court has observed witnesses testifying regarding such motion to suppress. *State v. Blakely, supra*. . . . If police have acted without a search warrant, the State has the burden of proof that the search was conducted under circumstances substantiating the reasonableness of such search or seizure. *State v. Vrtiska*, 225 Neb. 454, 406 N.W.2d 114 (1987).

State v. Abdouch, 230 Neb. 929, 930, 434 N.W.2d 317, 319 (1989). Accord, *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991); *State v. Juhl*, 234 Neb. 33, 449 N.W.2d 202 (1989).

Constitutional Justification of the Search.

Coleman contends that the officers' stopping the Buick in which he was a passenger violated the standard expressed in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), concerning an investigatory stop by police. Also, Coleman argues that the officers, after observing the Buick's erratic movement, including its crossing the centerline of 34th Avenue into the lane of traffic occupied by the police cruiser

and nearly colliding with the cruiser, should have "followed the vehicle for a short distance in order to determine whether possible criminal behavior was present." Brief for appellant at 11. However, Coleman does not point out what would have been legally significant if the car caravan continued on 34th Avenue with the officers' cruiser in pursuit of the Buick driven by Branch.

In *Terry v. Ohio, supra* at 392 U.S. at 16, the U.S. Supreme Court stated:

> It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.

Additionally, "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry v. Ohio, supra* at 392 U.S. at 22. Thus, "under *Terry v. Ohio* . . . police can constitutionally stop and briefly detain a person for investigative purposes if the police have a reasonable suspicion, supported by articulable facts, that criminal activity exists, even if probable cause is lacking under the fourth amendment." *State v. Staten, supra* at 18, 469 N.W.2d at 116. Accord *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991).

However, further discussion about a "*Terry* stop" is unnecessary to resolve the constitutional issue of the cocaine's admissibility in Coleman's trial.

A Search Incidental to Arrest.

We resume our analysis by considering "probable cause" to arrest without a warrant, namely: "When a law enforcement officer has knowledge, based on information reasonably trustworthy under the circumstances, which justifies a prudent belief that a suspect is committing or has committed a crime, the officer has probable cause to arrest without a warrant." *State v. Blakely*, 227 Neb. 816, §21, 420 N.W.2d 300, 304

(1988). Accord, *State v. Twohig, supra*; *State v. Staten, supra*; *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987).

The vehicle in which Coleman was a passenger made an erratic turn onto 34th Avenue, crossed the centerline of that public street occupied by an oncoming vehicle, and forced Officer Lang to take sudden and evasive action by sharply turning the cruiser from the path of the approaching vehicle and thereby avoiding a collision with the Buick carrying Coleman. Operation of the Buick violated at least one traffic statute in the "Nebraska Rules of the Road," see Neb. Rev. Stat. § 39-620 (Reissue 1988) (a vehicle shall be driven on the right half of the roadway), and was sufficient to provide the officers with an objective basis for the officers' reasonable or prudent belief that other Nebraska statutes may have been violated; for example, Neb. Rev. Stat. §§ 39-669 (Reissue 1988) (careless driving), 39-669.01 (Reissue 1988) (reckless driving), and 39-669.07 (Reissue 1988) (drunk driving or driving under the influence of a drug). Consequently, in Coleman's case, the officers had sufficient particularized and objective facts to stop the vehicle in which Coleman was riding, to issue a traffic citation to Branch for violating a Nebraska statute pertaining to proper operation of a motor vehicle, and to conduct further investigation into Branch's ability to safely operate a motor vehicle.

Moreover, the valid traffic stop led to discovery that the operator's license of the driver, Branch, was suspended and, hence, Branch's driving a motor vehicle subjected him to arrest for a violation of Neb. Rev. Stat. § 60-418 (Reissue 1988) (prohibition against a driver's operating a motor vehicle while the operator's driving privileges are suspended). Also, Branch was the subject of an outstanding arrest warrant and admitted that he was in possession of marijuana located in the Buick. Thus, the officers discovered the crack cocaine during their search of the Buick pursuant to a valid arrest of Branch. See *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981) (when a law enforcement officer has made a lawful custodial arrest of an automobile's occupant, the officer may, as a contemporaneous incident of that arrest, search the automobile's passenger compartment and examine contents of

any container, whether open or closed, within the passenger compartment).

Additionally, the officers found the cocaine during their inventory search of the Buick impounded on account of Branch's arrest, an impoundment which is unchallenged in Coleman's case. See, *South Dakota v. Opperman*, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976) (an inventory search of an automobile impounded by police protects the automobile owner's property while in police custody, protects police against claims or disputes over lost or stolen property, and protects police from potential danger; hence, inventories pursuant to standard police procedures are reasonable); *Colorado v. Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987) (inventory searches are a well-defined exception to the warrant requirement for a search; therefore, evidence discovered during a proper inventory search is constitutionally admissible); *State v. Stalder*, 231 Neb. 896, 438 N.W.2d 498 (1989) (evidence discovered during an inventory search of a vehicle is constitutionally admissible); *State v. Hill*, 214 Neb. 865, 336 N.W.2d 325 (1983) (evidence found by police without a warrant in an inventory search of a vehicle lawfully in police custody was constitutionally admissible). Cf. *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991) (constitutional admissibility of inventory items of property found on a defendant's person).

Therefore, the officers discovered the crack cocaine during a valid search of the vehicle in which Coleman was a passenger. Accordingly, Coleman's first assignment of error is without merit.

TESTIMONY ABOUT COLEMAN'S INCARCERATION

Coleman contends that the district court should have sustained the motion in limine and subsequently excluded Lang's testimony which recounted Coleman's statement that he was discharged from the state penitentiary on September 19, 1989, just over 2 months before Coleman's arrest for the cocaine charge on November 29, 1989.

Coleman's Motion in Limine.

Coleman misperceives the nature and function of a motion in

limine, which were discussed in *State v. Tomrdle*, 214 Neb. 580, 585-86, 335 N.W.2d 279, 283 (1983):

> A motion in limine is a procedural step to prevent prejudicial evidence from reaching the jury. Cf. *State v. Bennett*, [122] R.I. [276], 405 A.2d 1181 (1979). As explained in *Lagenour v. State*, 268 Ind. 441, 450, 376 N.E.2d 475, 481 (1978): "[I]t is not the office of a motion *in limine* to obtain a final ruling upon the ultimate admissibility of evidence . . . but is rather to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to a jury in any manner until the trial court has ruled upon its admissibility in the context of the trial itself." As noted in *Twyford v. Weber*, 220 N.W.2d 919, 923 (Iowa 1974): "It [the motion in limine] serves the useful purpose of raising and pointing out before trial certain evidentiary rulings the court may be called upon to make during the course of trial. . . . It is not a ruling on evidence and should not, except on a clear showing, be used to reject evidence. It adds a procedural step to the offer of evidence."
>
> . . . As clearly pointed out in *State v. Garrett*, 183 N.W.2d 652, 655 (Iowa 1971): "[T]he very purpose of the motion in limine is to receive an advance ruling on anticipated objectionable material . . . . [A] denial of a motion in limine . . . cannot, in and of itself, constitute reversible error . . . . The reason is simple. The objectionable material has not yet reached the jury's ears. It may never reach the jury." In the same mode is the ruling in *Twyford v. Weber, supra* at 924, that "where the motion is denied and opposing counsel attempts to ask the questions challenged in the motion . . . a proper objection at that time is necessary to preserve the right to complain on appeal . . . . Stated otherwise, where the motion is denied the movant must base his complaint on the trial record."

In view of *Tomrdle*, we expressed in *State v. Cox*, 231 Neb. 495, 506, 437 N.W.2d 134, 142 (1989):

> When a court overrules a motion in limine to exclude

> evidence, the movant must object when the particular evidence, previously sought to be excluded by the motion, is offered during trial and cannot predicate error on the admission of evidence to which no objection was made when the evidence was adduced.

Thus, because overruling a motion in limine is not a final ruling on admissibility of evidence and, therefore, does not present a question for appellate review, a question concerning admissibility of evidence which is the subject of a motion in limine is raised and preserved for appellate review by an appropriate objection to the evidence during trial.

Coleman's "Objection."

This brings us to the "objection" during trial to Lang's testimony about Coleman's incarceration in the penitentiary shortly before Coleman's arrest. In an effort to exclude Lang's testimony, Coleman's lawyer stated: "I object to any testimony regarding where Mr. Coleman was earlier in the fall prior to his arrest in November of 1989." Bearing in mind that Coleman's motion in limine was based on Neb. Evid. R. 403 and contained Coleman's apparent concession that his penitentiary confinement "may be relevant," was the objection during trial based on Rule 403? The objection, however, made no reference to Rule 403 or to the previously overruled motion in limine. Had Coleman withdrawn from his concession of relevancy, expressed in conjunction with his motion in limine, and at trial contended that testimony concerning his incarceration was irrelevant? Was Coleman's opposition to Lang's testimony a veiled invocation of the Nebraska Evidence Rules other than the rules concerning irrelevancy or the exclusion of relevant evidence pursuant to Neb. Evid. R. 403? Coleman's objection lacked not only a specified ground for inadmissibility of Lang's testimony, but also, in the objection's context at trial, provided no readily discernible basis for exclusion of Lang's testimony. Consequently, any ground or basis for Coleman's objection is open to reasonable and serious question.

Neb. Evid. R. 103(1)(a), Neb. Rev. Stat. § 27-103(1)(a) (Reissue 1989), provides that an appellant claiming reversible error as the result of admission of evidence must have made "a

timely objection . . . stating the specific ground of objection, if a specific ground was not apparent from the context . . . ." See, also, *Havlicek v. State*, 101 Neb. 782, 784, 165 N.W. 251 (1917) ("[i]t is the duty of counsel to make his [or her] objections so specific that the court may understand the point intended to be raised"); *State v. Todd*, 226 Neb. 906, 416 N.W.2d 13 (1987); *State v. Roggenkamp*, 224 Neb. 914, 402 N.W.2d 682 (1987).

One function of a proper objection is to direct the court's attention to questioned admissibility of particular evidence so that the court may intelligently, quickly, and correctly rule on the reception or exclusion of evidence. See, *State v. Bissonette*, 145 Vt. 381, 488 A.2d 1231 (1985); *Langenheim v. City of Seward*, 200 Neb. 740, 265 N.W.2d 446 (1978); *Fowler v. Bachus*, 179 Neb. 558, 139 N.W.2d 213 (1966); M. Graham, Handbook of Federal Evidence § 103.1 (3d ed. 1991); 21 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5032 (1977). Thus, a true objection does not wander among the Nebraska Evidence Rules in the hope of eventually ending its odyssey at the doorstep of a particular rule of evidence. In seeking to exclude evidence, counsel must adhere to a basic and straightforward approach: Tell the court the reason why the evidence is inadmissible! At best, Coleman's lawyer expressed general opposition to Lang's testimony, but failed to express that opposition based on any of the Nebraska Evidence Rules, either by reference to the numerical identification of a particular rule within the Nebraska Evidence Rules or through use of language contained in an evidential rule which rendered Lang's testimony inadmissible. Notwithstanding Coleman's "objection" and its unspecified exclusionary ground and cryptic basis for inadmissibility of Lang's testimony about Coleman's incarceration, the State tilts at windmills built in Coleman's brief and embarks on various considerations for admissibility of Lang's testimony. Nevertheless, at the risk of condoning, or even inviting, slipshod practice and procedure for objections to evidence, but aware of Coleman's possible ineffective assistance of counsel claim on account of his lawyer's failure to specify a basis for excluding Lang's testimony, we treat Coleman's objection as one based on the ground that Lang's testimony was irrelevant,

i.e., "[e]vidence which is not relevant is not admissible." Neb. Evid. R. 402, Neb. Rev. Stat. § 27-402 (Reissue 1989).

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Neb. Evid. R. 401, Neb. Rev. Stat. § 27-401 (Reissue 1989).

> "There are two components to relevant evidence: materiality and probative value. Materiality looks to the relation between the propositions for which the evidence is offered and the issues in the case. If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial. What is 'in issue,' that is, within the range of the litigated controversy, is determined mainly by the pleadings, read in the light of the rules of pleading and controlled by the substantive law . . . .
>
> "The second aspect of relevance is probative value, the tendency of evidence to establish the proposition that it is offered to prove. . . ."

State v. Baltimore, 236 Neb. 736, 740, 463 N.W.2d 808, 812 (1990) (quoting McCormick on Evidence § 185 (E. Cleary 3d ed. 1984)). Accord *State v. Messersmith*, 238 Neb. 924, 473 N.W.2d 83 (1991). "To be relevant, evidence must be rationally related to an issue by a likelihood, not a mere possibility, of proving or disproving an issue to be decided." *State v. Lonnecker*, 237 Neb. 207, 210, 465 N.W.2d 737, 740-41 (1991). Accord, *State v. Lomack, ante* p. 368, 476 N.W.2d 237 (1991); *State v. Baltimore, supra*.

Coleman's imprisonment shortly before his arrest was neither material nor probative concerning the charge that Coleman possessed cocaine when he was arrested after the traffic stop. First, the fact of imprisonment is not an element of the possession charge against Coleman, see § 28-416(1), and, hence, was immaterial to the prosecution of Coleman. Second, we find nothing in the fact of incarceration which, by itself, makes it more likely that the individual, previously incarcerated and later found in proximity to a controlled substance, possessed the controlled substance. Moreover, the adverse effect of Lang's testimony is found in the reasonable possibility

that a jury might somehow consider Coleman's recent incarceration as an indication of his guilt. Consequently, evidence of Coleman's previous incarceration was irrelevant and should have been excluded.

"Harmless Error" and "Overwhelming Evidence."

"In a jury trial of a criminal case, whether an error in admitting or excluding evidence reaches a constitutional dimension or not, an erroneous evidential ruling results in prejudice to a defendant unless the State demonstrates that the error was harmless beyond a reasonable doubt." *State v. Cox*, 231 Neb. 495, 504, 437 N.W.2d 134, 140 (1989). Accord, *State v. Lonnecker, supra*; *State v. Messersmith, supra*. "Harmless error exists in a jury trial of a criminal case when there is some incorrect conduct by the trial court which, on review of the entire record, did not materially influence the jury in a verdict adverse to a substantial right of the defendant." *State v. Watkins*, 227 Neb. 677, 686, 419 N.W.2d 660, 666 (1988). Accord, *State v. Dixon*, 237 Neb. 630, 467 N.W.2d 397 (1991); *State v. Cox, supra*.

Lang's testimony was the only evidence on Coleman's incarceration. While it is true that evidence is accumulated in the course of a trial to determine a defendant's guilt, not all evidence is cumulative. "Cumulative evidence" means "tending to prove the same point to which other evidence has been offered." Webster's Third New International Dictionary, Unabridged 553 (1981). Therefore, Lang's testimony was not cumulative evidence concerning Coleman's incarceration.

In the trial of a criminal case, erroneous admission of evidence which is not cumulative may constitute harmless error beyond a reasonable doubt, when a defendant's conviction is supported by overwhelming evidence which has been properly admitted or admitted without objection. See *State v. Watkins, supra*. In contrast with the preceding, we have expressed the "harmless error" standard pertaining to erroneous admission of cumulative evidence: "Erroneous admission of evidence is harmless error and does not require reversal if the evidence erroneously admitted is cumulative and other relevant evidence, properly admitted, or admitted without objection,

supports the finding by the trier of fact." *State v. Cox, supra* at 504, 437 N.W.2d at 140. Accord, *State v. Messersmith, supra* (erroneous admission of cumulative evidence; no reversible error); *State v. Twohig*, 238 Neb. 92, 469 N.W.2d 344 (1991) (erroneous admission of cumulative evidence; no reversible error). For other Nebraska decisions reflecting the "overwhelming evidence" standard, which renders erroneously admitted noncumulative evidence "harmless beyond a reasonable doubt," see, *State v. Chapman*, 234 Neb. 369, 451 N.W.2d 263 (1990); *State v. Oliva*, 228 Neb. 185, 422 N.W.2d 53 (1988); *State v. Smith*, 218 Neb. 201, 352 N.W.2d 620 (1984); *State v. Weible*, 211 Neb. 174, 317 N.W.2d 920 (1982); *State v. Van Egmond*, 206 Neb. 356, 293 N.W.2d 74 (1980); and *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977). The "overwhelming evidence" standard in relation to "harmless error" has been adopted by several jurisdictions other than Nebraska; for example, *Justice v. State*, 775 P.2d 1002 (Wyo. 1989); *Jones v. State*, 536 N.E.2d 267 (Ind. 1989); *State v. Lafferty*, 749 P.2d 1239 (Utah 1988); *State v. DePew*, 38 Ohio St. 3d 275, 528 N.E.2d 542 (1988); *Com. v. Bricker*, 378 Pa. Super. 265, 548 A.2d 604 (1988); *People v. Rodgers*, 756 P.2d 980 (Colo. 1988); *U.S. v. Moore*, 872 F.2d 251 (8th Cir. 1989); *U.S. v. Gonzalez*, 833 F.2d 1464 (11th Cir. 1987); and *United States v. Ackerman*, 704 F.2d 1344 (5th Cir. 1983).

Although Lang's testimony concerning Coleman's statement about previous incarceration was irrelevant and, therefore, should have been excluded, there was other evidence before the jury, admitted without objection or properly admitted over objection, which tended to establish Coleman's guilt, such as the circumstances surrounding Coleman's arrest during the traffic stop and his statements. For example, Coleman acknowledged that he was a "user" of cocaine; had purchased the crack cocaine discovered during the traffic stop; and, regarding that cocaine, was going to use it, since "it was a new thing to do." Anthony Coleman, as the only occupant of the back seat in the Buick, had easy access to the back seat ashtray where the crack cocaine was found, became frightened at the police traffic stop, and put the cocaine in the Buick's ashtray on the back of the passenger seat immediately in front of himself.

Additionally, Coleman "fessed up" to the fact that he was the person in possession of the cocaine discovered during the traffic stop because he did not want to get Branch and his nephew "in trouble." Any prejudice which might have resulted from Lang's testimony regarding Coleman's previous incarceration shortly before his arrest on November 29, 1989, pales by comparison with the damaging effect and, therefore, prejudice to Coleman's case as the result of his incriminating statements and the circumstances of his arrest. We conclude that the overwhelming evidence in Coleman's case renders the erroneous admission of Lang's testimony about Coleman's previous incarceration "harmless beyond a reasonable doubt." Consequently, admission of Lang's testimony in question does not require reversal of Coleman's conviction.

We note the proposition expressed in the State's brief: "The court's determination regarding admissability will not be set aside absent an abuse of discretion." Brief for appellee at 18. We direct the State to the recent decision *State v. Messersmith*, 238 Neb. 924, 936, 473 N.W.2d 83, 92 (1991), wherein we expressly disapproved the expression " 'The admission or exclusion of evidence is a matter within the discretion of the trial court.' " For that reason, we also reject the proposition expressed by the State in Coleman's case regarding our review of a trial court's ruling on admissibility of evidence.

Finally, we must comment on the district court's remark when the court denied Coleman's motion in limine "with the understanding [Coleman] is going to testify. Should that status change, then I might change my mind on the motion in limine also."

Neb. Evid. R. 104(2), Neb. Rev. Stat. § 27-104(2) (Reissue 1989), states: "When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition." Admissibility of Coleman's previous incarceration did not involve a factual question for conditional admissibility within the purview of Rule 104(2), that is, evidence of incarceration would not somehow be rendered inadmissible if Coleman did not testify in his trial; rather, Coleman's motion in limine to

exclude Lang's testimony about Coleman's previous incarceration and the eventual ruling on admissibility of that evidence in Coleman's trial were matters of law generally for the court's consideration unaffected by the possibility of Coleman's testifying or not testifying at trial. In situations such as that presented in Coleman's case, a trial court should rule on a motion in limine irrespective of anticipation that a defendant will testify or likelihood that a defendant may testify. Coleman's motion in limine stood on its own merits without reference to the possibility or likelihood of his testifying at trial.

Since Coleman's assignments of error are without merit, we affirm Coleman's conviction.

AFFIRMED.

IN RE INTEREST OF C.W., M.W., K.W., AND J.W., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLANT, V. D.W., APPELLANT AND CROSS-APPELLEE, ROSEBUD SIOUX TRIBE, APPELLEE AND CROSS-APPELLEE.

479 N.W.2d 105

Filed January 17, 1992. No. 90-157.

1. **Actions: Collateral Attack: Jurisdiction.** Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter.
2. **Parental Rights: Trial: Evidence: Appeal and Error.** The improper admission of evidence by the trial court in a parental rights termination proceeding does not, in and of itself, constitute reversible error, for, as long as an appellant properly objected at trial, this court will not consider any such evidence in its de novo review of the record.
3. **Indian Child Welfare Act: Expert Witnesses: Parental Rights.** Pursuant to the Indian Child Welfare Act, qualified expert testimony is required in a parental rights termination case on the issue of whether serious harm to the Indian child is likely to occur if the child is not removed from the home.
4. **Trial: Expert Witnesses: Appeal and Error.** A trial court is allowed discretion in determining whether a witness is qualified to testify as an expert, and unless the court's finding is clearly erroneous, such a determination will not be disturbed on appeal.

5. **Indian Child Welfare Act: Courts: Jurisdiction.** The Indian Child Welfare Act does not divest state courts of their jurisdiction over children of Indian descent living off the reservation.
6. **Indian Child Welfare Act: Courts: Jurisdiction: Good Cause.** State courts may exercise jurisdiction concurrently with the tribal courts in regard to those Indian children who do not reside and are not domiciled on their tribe's reservation; however, a state court must refer the matter to a tribal court unless good cause is shown for the retention of state court jurisdiction.
7. **Indian Child Welfare Act: Courts: Jurisdiction.** That a state court may take jurisdiction under the Indian Child Welfare Act does not necessarily mean that it should do so, as the court should consider the rights of the child, the rights of the tribe, and the conflict of law principles, and should balance the interests of the state and the tribe.
8. **Indian Child Welfare Act: Evidence: Records: Good Cause: Appeal and Error.** Under the Indian Child Welfare Act, factual support must exist in the trial record for the purposes of appropriate appellate review as to good cause for failure to comply with statutory child placement preference directives.
9. **Indian Child Welfare Act: Jurisdiction.** Regarding the Indian Child Welfare Act, in determining whether the doctrine of forum non conveniens should be invoked the trial court should consider practical factors that make trial of the case easy, expeditious, and inexpensive, such as relative ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the ability to secure attendance of witnesses through compulsory process.
10. **Indian Child Welfare Act.** The Indian Child Welfare Act does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus.
11. **Indian Child Welfare Act: Jurisdiction.** The best interests of the child standard is applicable to a decision over whether to transfer the jurisdiction of a child custody proceeding to a tribal court.
12. **Indian Child Welfare Act: Courts: Jurisdiction: Good Cause.** Good cause exists for the denial of transfer of the proceeding from a state to a tribal court, for Indian Child Welfare Act purposes, based on the delay of a tribe in expressing intent to intervene, the fact that a state court forum provides better opportunity for production of valuable evidence, and the consideration that transfer of the proceeding to the tribal court would not be in the child's best interests.
13. **Trial: Guardians Ad Litem: Parental Rights.** Guardians ad litem have not been restricted in their presentation of evidence or participation at trial, and there is no reason why a guardian ad litem for a child in a termination proceeding should be restricted.
14. **Appeal and Error.** Consideration of a case will be limited to errors assigned and discussed.
15. **Trial: Proof: Appeal and Error.** A party who challenges a trial court, asserting that the court abused its discretion with regard to sanctions imposed for discovery violations, must show that the ruling of the court was clearly untenable, depriving the litigant of a substantial right and denying a just result in the matter submitted for disposition.

16. **Indian Child Welfare Act: Good Cause.** Regarding the Indian Child Welfare Act, it is patently clear that Congress envisioned situations in which the child's best interests may override a tribal or family interest. The preferences for placement expressed by the act are to be followed absent good cause to the contrary.

Appeal from the Separate Juvenile Court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Sandra Hernandez Frantz for appellant.

Gary E. Lacey, Lancaster County Attorney, and Alicia B. Henderson for appellee State.

Kevin Ruser for appellee Rosebud Sioux Tribe.

Susan Jacobs, guardian ad litem.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

A series of petitions alleged separately that each of the four children involved in this case lacked proper parental care by reason of the fault and habits of their mother, D.W., appellant. All four of the children had been born out of wedlock and had been under the jurisdiction of the juvenile court for years prior to the commencement of the termination proceeding that is the subject of this action.

The Rosebud Sioux Tribe was notified of the first petition, of which M.W. was the subject, by registered mail, return receipt requested. The tribe received notice 20 days before adjudication, but informed the Lancaster County Attorney in writing over 1 month after M.W.'s adjudication as a neglected child that the Rosebud Sioux Tribe would not accept jurisdiction of the case, citing noneligibility of both the mother and M.W. for enrollment. The Rosebud Sioux Tribe suggested that the mother and M.W. might possibly be members of the Oglala Sioux Tribe and subsequently notified by letter the Oglala Sioux Tribe, informing it of the proceedings regarding M.W.

A second petition was filed in juvenile court, this one

concerning C.W., and a copy thereof was sent to the Rosebud Sioux Tribe. The Rosebud Sioux Tribe again declined to intervene, but later posited that the mother *was* eligible and should she decide to enroll herself in the tribe, then the tribe should be sent notice.

The Oglala Sioux Tribe filed its notice of intervention and petition for transfer for both M.W. and C.W. The juvenile court transferred the case; however, upon appellant's objection to the transfer, the transfer was set aside, and C.W. was also adjudicated as a neglected child.

Later, a third petition was filed in the interest of K.W., and in light of the previous responses from the Rosebud Sioux Tribe indicating its position on the matter, notice was sent only to the Oglala Sioux Tribe.

Two weeks after K.W.'s adjudication as neglected, the juvenile court was informed that the Oglala Sioux Tribe would decline to intervene in the case because the mother was not on the official records as the daughter of a member of the tribe and was therefore not eligible for enrollment in the Oglala Sioux Tribe.

The mother's fourth child was the subject of the fourth petition to be filed, which took place in Adams County Court, as J.W. had been born in an Adams County hospital. J.W. was adjudicated a neglected child and her case was transferred to Lancaster County for disposition. After each adjudication concerning the four children, dispositional and review hearings were held on a regular basis.

A supplemental petition requested termination of the mother's parental rights on the grounds of abandonment, neglect, and her habitual use of intoxicating liquor and narcotics. No personal service of the supplemental petition was made on the mother and ineffective service was made on the Oglala Sioux and Rosebud Sioux Tribes.

Additionally, the appellant was given a substantial quantity of discovery material 7 days before trial, and another stack of discovery material at 7 p.m. the evening before trial, alleged by the mother in her brief to have been purposed to set the appellant at a tactical disadvantage.

The case was dismissed due to the insufficient notice to the

tribe, but the State refiled, sending proper notice to the tribe. Shortly before trial the Rosebud Sioux Tribe filed a petition for transfer of jurisdiction to the tribal court, which the court sustained. Three days later the State filed its motion for new trial and vacation of the juvenile court's order of transfer of jurisdiction, which was ultimately sustained. That same day the Rosebud Sioux Tribe filed an order accepting the transfer of jurisdiction.

The trial on the termination of parental rights proceeded. The court terminated the mother's parental rights, stating that she was unfit by reason of abuse of intoxicating liquor and drugs, and that reasonable efforts to correct the problems had failed. The court further terminated the parental rights of the respective putative fathers of the children and ordered that the matter be transferred to the Rosebud Sioux Tribe for the dispositional phase of the proceeding. The juvenile court stayed transfer of the children pending appeal.

Appellant alleges what we have summarized as 11 assignments of error, in which she claims that the juvenile court erred in that it (1) terminated her parental rights in violation of the Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901 et seq. (1988) (hereinafter the ICWA); (2) obtained jurisdiction of the matter in violation of the ICWA; (3) took judicial notice of a juvenile court file which contained evidence admitted in violation of the ICWA and took judicial notice of such file in violation of appellant's rights to confrontation and cross-examination; (4) terminated her parental rights when the petitioner had not provided qualified experts to testify, as required under the ICWA; (5) abused its discretion by refusing to transfer the case to the Rosebud Sioux Tribal Court; (6) exercised jurisdiction when it no longer had jurisdiction, as the Rosebud Sioux Tribal Court had accepted jurisdiction; (7) terminated appellant's parental rights when petitioner had not met its burden of proof beyond a reasonable doubt, nor had petitioner shown that appellant had caused any direct harm to the minor children; (8) considered the guardian ad litem's recommendations and evidence when the guardian ad litem had not adhered to the principles of the ICWA nor her statutory duties as guardian ad litem; (9) admitted into evidence

information from tribal files, social worker files, and attorney files as business records; (10) used violations of the ICWA as to placement of Indian children and the consequences of said placement against the appellant; and (11) should have excluded discovery material that was produced to appellant late.

The county attorney and guardian ad litem cross-appeal, assigning as error the juvenile court's ultimate transfer of the matter to the Rosebud Sioux Tribal Court.

In her first and second assignments of error the mother generally alleges that the trial court obtained jurisdiction and that her parental rights were terminated in violation of the ICWA. The assignments are without merit.

While the mother contends that the ICWA has been violated in many ways, she makes no references to the record to where those violations may have occurred. She does refer in her argument to the incidents of the court's taking judicial notice of files containing evidence obtained in violation of the ICWA, which we shall address later in discussion of that specific assignment.

What the mother does address clearly is her general dissatisfaction regarding the fashion in which the juvenile court obtained jurisdiction in the adjudications of her children as neglected. Collateral attacks on previous proceedings are impermissible unless the attack is grounded upon the court's lack of jurisdiction over the parties or subject matter, in keeping with our decisions in *State v. Reuter*, 216 Neb. 325, 343 N.W.2d 907 (1984), and *State v. Kelly*, 212 Neb. 45, 321 N.W.2d 80 (1982). Such challenges should timely have been made after the adjudications, which were final orders, and we consider the first two assigned errors no further.

The third assignment of error alleges that the juvenile court took judicial notice of a juvenile court file which contained evidence admitted in violation of the ICWA and also that such notice violated the mother's rights to confrontation and cross-examination. Appellant objected at trial only to the court's taking judicial notice of the predispositional reports and the attachments thereto. We decide this case de novo on the record, as we have held that we are obliged to do, see *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990),

and will consider only the relevant and untainted evidence.

While we recognize the Nebraska Evidence Rules are not applicable in a dispositional hearing, including a hearing to terminate parental rights, the requirements of due process control a proceeding to terminate parental rights and the type of evidence which may be used by the State in an attempt to prove that parental rights should be terminated. See *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987).

> The improper admission of evidence by the trial court in a parental rights termination proceeding does not, however, in and of itself, constitute reversible error, for, as long as the appellant properly objected at trial, this court will not consider any such evidence in its de novo review of the record.

In re Interest of D.S. and T.S., 236 Neb. 413, 414-15, 461 N.W.2d 415, 418 (1990).

It is obvious that fundamental due process is difficult to define. With reference to the evidence that is to be considered in a parental rights termination case, it is further obvious that in determining whether or not fundamental due process has been afforded to all persons interested in the proceedings, the Nebraska rules of evidence provide a guidepost in that determination. Thus, as in this principal case where hearsay evidence was excluded as fundamentally unfair, the Nebraska rules of evidence would similarly have prohibited the introduction of such evidence. Throughout this opinion we will specify what evidence we rely upon in arriving at the respective holdings.

In the mother's fourth assignment of error, she alleges that the petitioner had not provided qualified experts, in violation of the ICWA. The assignment is without merit.

The only expert witness to whom the mother objected at trial was Dr. Gary Melton, and thus, our review is limited to his status as an expert.

Pursuant to the ICWA, qualified expert testimony is required in a parental rights termination case on the issue of whether serious harm to the Indian child is likely to occur if the child is not removed from the home. See Guidelines for State

Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,593 (1979) (not codified).

The Bureau of Indian Affairs sets forth guidelines under which expert witnesses most likely will meet the requirements of the ICWA:

> (i) A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and childrearing practices.
>
> (ii) A lay expert witness having substantial experience in the delivery of child and family services to Indians, and extensive knowledge of prevailing social and cultural standards in childrearing practices within the Indian child's tribe.
>
> (iii) A professional person having substantial education and experience in the area of his or her specialty.

Id.

Dr. Melton obtained a Ph.D. from Boston University, is licensed to practice psychology in Nebraska, and is a certified clinical psychologist with extensive clinical research experience with children. Dr. Melton's research revealed that there exist no comparative studies between Native American children and other children in their respective needs for stability and security.

Appellant's own experts, Dr. Garrett Grandbois and Clyde Tyndall, concur with a finding that Native American children need stability and, in fact, had recommended that the mother establish and maintain a stable home environment for her children.

Whether a witness is qualified to testify as an expert under Neb. Evid. R. 702 is a preliminary question of admissibility for a trial court under Neb. Evid. R. 104(1). Such a determination will be upheld on appeal unless the trial court's finding is clearly erroneous. *State v. Reynolds*, 235 Neb. 662, 457 N.W.2d 405 (1990).

In *Matter of Welfare of T.J.J.*, 366 N.W.2d 651, 655 (Minn. App. 1985), Minnesota's Court of Appeals noted in dicta that "a witness' background in Indian culture does not necessarily determine whether that witness is qualified as an expert under the Act."

Other courts have found that individuals who are professionals with substantial education and experience in psychology are deemed to be qualified experts under the ICWA. See *In re Kreft*, 148 Mich. App. 682, 384 N.W.2d 843 (1986).

We find that evidence existed to support the trial court's finding that Dr. Melton qualified as an expert. Dr. Melton possesses substantial education and experience in his area of specialty, and his lack of experience with the Indian way of life in no way compromised or undermined the value of his testimony. The assignment of error as to the use of his testimony at trial is therefore without merit.

As to the mother's fifth and sixth assignments of error regarding the propriety of the juvenile court's jurisdiction and failure to transfer the matter to the tribal court, we find the assignments are without merit.

The ICWA was enacted to promote the stability and security of Indian tribes and families through the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture.

When Congress enacted the ICWA, it had two main goals: (1) protecting the best interests of the Indian children and (2) promoting the stability and security of Indian tribes and families. See 25 U.S.C. § 1902. The act is based on the assumption that protection of the Indian child's relationship to the tribe is in the child's best interests. *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989).

ICWA § 1911 mandates that the Indian tribe have jurisdiction in all child custody proceedings "involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law." The ICWA does not, however, divest state courts of their jurisdiction over children of Indian descent living off the reservation. *Kiowa Tribe of Oklahoma v. Lewis*, 777 F.2d 587 (10th Cir. 1985), *cert. denied* 479 U.S. 872, 107 S. Ct. 247, 93 L. Ed. 2d 171 (1986). State courts may exercise jurisdiction concurrently with the tribal

courts in regard to those Indian children who do not reside and are not domiciled on their tribe's reservation; however, a state court must refer the matter to a tribal court unless good cause is shown for the retention of state court jurisdiction. See 25 U.S.C. § 1911(b).

Under the ICWA, if the tribe or either parent of the Indian child petitions for transfer of the proceeding to the tribal court, the state court cannot proceed with the placement of an Indian child living outside a reservation without first determining whether jurisdiction of the matter should be transferred to the tribe. See § 1911(b).

At a hearing on a petition to transfer a termination of parental rights proceeding to tribal court under the ICWA, the party opposing the transfer has the burden of establishing that good cause not to transfer the matter exists. See, 25 U.S.C. § 1911(b); *Mississippi Choctaw Indian Band v. Holyfield, supra.*

Regardless of whether such tribal jurisdiction is concurrent with or exclusive of state jurisdiction, all courts in the United States must give full faith and credit to the child custody determinations of tribal courts to the same extent that full faith and credit are given to the decisions of any other entity. See 25 U.S.C. § 1911(d). In the case where applicable state or federal law provides a higher standard of protection to the rights of the parent or Indian custodian of the Indian child than the rights provided under the ICWA, the state or federal court shall apply the state or federal standard. 25 U.S.C. § 1921.

That a state court may take jurisdiction does not necessarily mean that it should do so, as the court should consider the rights of the child, the rights of the tribe, and the conflict of law principles, and should balance the interests of the state and the tribe. See *Application of Bertelson*, 189 Mont. 524, 617 P.2d 121 (1980).

Under the ICWA, factual support must exist in the trial record for the purposes of appropriate appellate review as to good cause for failure to comply with statutory child placement preference directives. *In re Interest of Bird Head*, 213 Neb. 741, 331 N.W.2d 785 (1983).

The Bureau of Indian Affairs has published nonbinding

federal guidelines interpreting the ICWA's definition of "good cause to the contrary" as including, but not limited to, cases where (1) the proceeding is at an advanced stage when the petition to transfer is received, and the petition is not promptly filed after receipt of notice; (2) the Indian child is over the age of 12 and objects to the transfer; (3) evidence necessary to decide the case cannot be adequately presented to the tribal court without undue hardship to the witnesses and parties; and (4) the parents of an Indian child over the age of 5 are not available, and the child has had little or no contact with the child's tribe or members of the child's tribe. Additionally, the guidelines specify that socioeconomic conditions and the perceived adequacy of tribal or Bureau of Indian Affairs social services or judicial systems may not be considered in determining whether good cause exists. The burden of establishing good cause shall be on the party opposing the transfer. Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (1979) (not codified).

The third element of the guidelines has been applied to deny transfer due to considerations of forum non conveniens, such as availability of witnesses and access to proof. See *In Interest of J.R.H.*, 358 N.W.2d 311 (Iowa 1984). The Court of Appeals of South Carolina found in *Chester Co. Dept. of Soc. Serv. v. Coleman*, 296 S.C. 355, 372 S.E.2d 912 (S.C. App. 1988), that good cause may exist under the statute:

> What little we are able to glean from the record indicates that a biological parent of the two older girls, both of whom are over five years of age, may be unavailable; that none of the children has had any contact with the tribe or has resided on the reservation for a significant period of time; and that material witnesses and evidence relating to placement are in South Carolina, not South Dakota. These factors, together with evidence that removal of the children would be disruptive and detrimental to their best interests, may well constitute "good cause" for the family court to retain jurisdiction . . . .

Id. at 359, 372 S.E.2d at 915. Unable to make such a factual determination, the court remanded the cause for further consideration.

Iowa's Supreme Court, in *Interest of J.R.H., supra*, also interpreted "good cause" to include geographical conditions. The court subsequently found that there was good cause to deny transfer of the proceedings to the tribal court in South Dakota, as the evidence necessary to decide the case could not be adequately presented in the tribal court without undue hardship to the parties or witnesses.

In determining whether the doctrine of forum non conveniens should be invoked, the trial court should consider practical factors that make trial of the case easy, expeditious, and inexpensive, such as the relative ease of access to sources of proof, the cost of obtaining attendance of witnesses, and the ability to secure attendance of witnesses through compulsory process. *Matter of Wayne R.N.*, 107 N.M. 341, 757 P.2d 1333 (N.M. App. 1988).

The Supreme Court of South Dakota held in *Matter of Dependency and Neglect of A.L.*, 442 N.W.2d 233 (S.D. 1989), that notice of the proceeding concerning the dependency and neglect of children enrolled in the tribe gave the tribe actual notice, even though the tribe did not receive registered notice, and thus, the tribe's request to transfer the case to the tribal court was untimely where the tribe orally petitioned for transfer 1 year after receiving notice.

The Superior Court of Pennsylvania found in *In re Adoption of K.L.R.F.*, 356 Pa. Super. 555, 515 A.2d 33 (1986), that an adoptive Indian mother's placement of her Indian child with foster parents was temporary. Thus, the Indian mother had the right and ability under the federal ICWA to withdraw her consent to the placement and to effectuate the immediate return of the child, notwithstanding the fact that adoption may have been, at one time, the "ultimate objective" of the parties, where placement was purely consensual. The adoptive Indian parent furthermore had standing, the court found, to rely upon and demand compliance with provisions of the federal ICWA with respect to the action to terminate her parental rights.

This court, in *In re Interest of Bird Head*, 213 Neb. 741, 750, 331 N.W.2d 785, 791 (1983), recognized that the ICWA "does not change the cardinal rule that the best interests of the child are paramount, although it may alter its focus."

In *Matter of T.S.*, 245 Mont. 242, 801 P.2d 77 (1990), the Supreme Court of Montana found that the best interests of the child standard was applicable to a decision over whether to transfer the jurisdiction of a child custody proceeding to a tribal court. The evidence in *T.S.* was uncontroverted in indicating that the transfer of the child from a stable environment would devastate the child and have long-term harmful effects. The court further found that the transfer of jurisdiction to a tribal court was not mandated by the ICWA where, although the child was eligible for membership in an Eskimo tribe, neither the child nor her mother was a member of the tribe, the child had never lived on the reservation, and the child had never had any contact whatsoever with the tribe.

The Supreme Court of Oklahoma similarly found, in *Matter of N.L.*, 754 P.2d 863 (Okla. 1988), that the presence of the witnesses in Okmulgee County and the best interests of the child supported the finding of good cause to deny the mother's request for transfer of jurisdiction to the tribal court.

The California Court of Appeal held in *In re Robert T.*, 200 Cal. App. 3d 657, 246 Cal. Rptr. 168 (1988), that good cause existed for the denial of transfer of the proceeding from the state to the tribal court, for ICWA purposes, based on the delay of the tribe in expressing intent to intervene, the fact that the state court forum provided a better opportunity for production of valuable evidence, and the consideration that transfer of the proceeding to the tribal court would not be in the child's best interests.

Conversely, in *In re Armell*, 194 Ill. App. 3d 31, 550 N.E.2d 1060 (1990), the Appellate Court of Illinois strictly construed the Bureau of Indian Affairs guidelines in finding that the best interests of the child standard and the psychological effects of the transfer were inapplicable in the determination of whether "good cause" existed not to transfer the case to the tribal court.

The only remotely applicable federal case is *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989), which stated that the domicile of illegitimate infants is that of their mother. In *Holyfield*, the mother's tribal reservation was the domicile of the twin infants, and the tribal court had exclusive jurisdiction over the custody

proceeding, even though neither of the twins had ever actually been on the reservation. *Holyfield* neither speaks to nor disposes of any issue in this case.

As to the juvenile court's decision to vacate the previous order of transfer to the Rosebud Sioux Tribal Court and retain the matter in the juvenile court, we affirm. The order of transfer to the tribal court was not a final order until the tribal court formally accepted the jurisdiction, and the judge explicitly stated as much in his order. Not unlike the option of revoking an offer prior to acceptance, the juvenile court had the discretion to revoke the "offer" of jurisdiction prior to the Rosebud Sioux Tribe's acceptance, and legitimately did so.

We next ask whether this discretion was abused. We find that neither the children nor their mother were domiciled on the reservation, transfer of jurisdiction is not mandatory, and good cause existed for retaining the matter in juvenile court.

The court stated, in its November 20, 1989, findings, its reasons for the finding of good cause. The court considered the 8-year history of the case, including the facts that the appellant opposed the 1982 transfer to the Oglala Sioux Tribe, pursuant to her right to do so under the ICWA, and that in 1982 the Oglala Sioux Tribal Court judge approved of placement of two of the children in non-Indian homes. Not only was the petition for transfer filed at an advanced stage in the proceedings, but all of the evidence was located in Lancaster County. To transfer the proceedings to the tribal court, located in South Dakota, would pose an undue hardship to the witnesses and parties, and in that we find good cause to retain the proceedings in the juvenile court. We affirm the juvenile court's decision to retain jurisdiction of the matter in that court.

Appellant also claims in the seventh assignment of error that her parental rights were terminated without the petitioner proving its case beyond a reasonable doubt or showing that the mother had caused any direct harm to the minor children.

While generally assigning whether the petitioner had met the burden of proof beyond a reasonable doubt, as required by 25 U.S.C. § 1912(f), appellant does not allege that the evidence was insufficient to terminate her rights, but only specifies that the experts produced by the petitioner were not qualified as

such under the ICWA. As we held above, the experts produced by the petitioner were qualified; thus, this assignment is without merit. We further find that the State has proven beyond a reasonable doubt that the best interests of the children require termination of appellant's parental rights.

As to the issue of whether proof of the mother's direct harm to the children exists, the record is replete with evidence of her addictions, as well as her subsequent denials regarding the addictions to alcohol and inhalants. During the trial regarding the issue of termination of parental rights, the mother was committed to a detoxification center for protective custody. She had been committed to the Hastings Regional Center between July and October 1989, she was scheduled for a mental health commitment hearing because her guardian ad litem alleged that she required commitment, and she spent a night in jail for disturbing the peace at the detoxification center. She also had served over 900 days in jail for offenses related to her alcohol and inhalant addictions.

Dr. Melton testified, as an expert witness, that the children would likely suffer serious emotional harm if returned to their mother now or in the near future and that continued contact would unsettle and undermine the stability of their current living situations.

The evidence supports a causal relationship between the mother's behavior and likely damage to the children, and we will not ask the children to wait and see whether their mother grows up in the future. She has not found the incentive to mature and change her lifestyle over the years this case has been progressing through the juvenile court, when that was the only obstruction to having her children returned to her.

Appellant alleged in the eighth assignment of error violations of the ICWA in the guardian ad litem's recommendations and evidence. She specifically cites that the guardian ad litem "tried to keep out evidence that the Appellant presented" and that the guardian ad litem did not make an effort to find proper placement of the children so that they "could avoid the certain identity crisis that they will now experience." Brief for appellant at 33. The mother does not argue the principles of the ICWA that have been violated.

We find this assignment without merit. Guardians ad litem have not been restricted in their presentation of evidence or participation at trial, and there is certainly no reason why a guardian ad litem for a child in a termination proceeding should be restricted. See, *In re Interest of D.S. and T.S.*, 236 Neb. 413, 461 N.W.2d 415 (1990); *In re Interest of D.D.P.*, 235 Neb. 864, 458 N.W.2d 193 (1990); *In re Interest of R.W.*, 236 Neb. 420, 461 N.W.2d 545 (1990).

Appellant did not argue the merits of her ninth assignment of error regarding the court's consideration of certain files as business records. We therefore do not consider it. See *In re Interest of P.M.C.*, 231 Neb. 701, 437 N.W.2d 786 (1989). The Nebraska Supreme Court rules address the same position at Neb. Ct. R. of Prac. 9D(1)(d) (rev. 1991), by stating that "consideration of the case will be limited to errors assigned *and* discussed." (Emphasis supplied.)

Appellant alleges in the 10th assignment of error that the juvenile court used violations of the ICWA as to placement and consequences of those violations against the appellant. The assignment is without merit.

ICWA § 1915 and Neb. Rev. Stat. § 43-1508 (Reissue 1988) require that Indian children be placed in foster care by a preference system: first, to an extended family member; then, to an Indian home specified by the child's tribe; then, to an Indian foster home; and finally, to an Indian institution. These placement preferences yield to the wishes of the parent when contrary to the statutory scheme, and will yield for other good cause. "For purposes of foster care, preadoptive or adoptive placement, a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations: (i) The request of the biological parents. . . ." 44 Fed. Reg. 67,594 (1979).

Upon initial placement of the children, efforts were made to locate Indian foster homes for them, but Indian foster homes were not available. Even during trial, attempts were made to find Indian families, to no avail.

The mother specifically requested on several occasions that her children be placed in non-Indian foster homes, specifically directing that she did not want the children placed with family

members. Additionally, the tribes with which the mother is associated did nothing to assist in the children's placement and honored her decision to allow the children to be placed in non-Indian foster homes.

Seven years after the case began and 10 months after the termination petition was filed, the mother filed a motion to change placement. She did not appear for hearing and presentation of evidence on that motion.

The mother's plea that placement was in violation of the ICWA is without merit due to the fact that she unilaterally made the determination that the placement of her children should deviate from the ICWA scheme, and we therefore affirm the juvenile court's decision to place the children with non-Indian families.

Appellant's final assignment of error raises the failure of the juvenile court to exclude certain discovery material that was produced to the appellant late. We have held that the party who challenges the trial court, asserting that the court abused its discretion with regard to sanctions imposed for discovery violations, must show that "the ruling of [the] judge [was] clearly untenable, depriving the litigant of a substantial right and denying a just result in the matter submitted for disposition." *D.S. v. United Catholic Soc. Servs.*, 227 Neb. 654, 666, 419 N.W.2d 531, 538 (1988). Appellant makes no such showing, and her assignment is without merit.

As to the cross-appeal of the Lancaster County Attorney and guardian ad litem for the children, we reverse the juvenile court's decision to transfer the proceedings to the Rosebud Sioux Tribal Court for the purpose of disposition or placement of the children.

We find *Mississippi Choctaw Indian Band v. Holyfield*, 490 U.S. 30, 109 S. Ct. 1597, 104 L. Ed. 2d 29 (1989), not dispositive of the present case. In that case, the U.S. Supreme Court held that a parent may not attempt to defeat the interests of the tribe by temporarily moving away from the reservation to give birth. While the case reflects that it is the tribe's decision to determine what is in the Indian child's best interests, the holding is applicable only where the child is deemed domiciled on the reservation.

Both Neb. Rev. Stat. § 43-1504(2) (Reissue 1988) and 25 U.S.C. § 1911(b) provide that a case of a nondomiciled Indian child only be transferred to the jurisdiction of the tribe upon request "in the absence of good cause to the contrary." As stated above, one of the goals of the ICWA is to protect the best interests of Indian children, as recognized and upheld by numerous courts across the country.

The Arizona Court of Appeals, in *Matter of Appeal in Maricopa County*, 136 Ariz. 528, 667 P.2d 228 (Ariz. App. 1983), considered, in an adoption case, the length of time a child had been with the adoptive mother, the occurrence of bonding, and testimony that removal of the child would cause psychological damage to the child. The court expounded that from the congressional policy, "[i]t is patently clear that Congress envisioned situations in which the child's best interest may override a tribal or family interest—the preferences for placement are to be followed absent 'good cause to the contrary.' [25 U.S.C.] § 1915(a),(b)." 136 Ariz. at 534, 667 P.2d at 234.

In *Matter of Adoption of T.R.M.*, 525 N.E.2d 298 (Ind. 1988), the Indiana court dealt with a child who had lived with the same foster family all of her 7 years of life, recognizing that

> [to] now sever and dislodge the child from the family and culture she has known during all of her seven years of life cannot be anything except devastating to the best interests of the child. The purpose of the ICWA, to protect the interests of the Indian family, is patently clear. However, a paramount interest is the protection of the best interests of the child.

Id. at 308.

Largely by their mother's choice, the children involved in this situation have had little exposure to their Indian culture, and the value of transfer to the tribe with future exposure to the Indian ways of life must be balanced first against the detrimental consequences these children will suffer due to the separation from the psychological parents to whom the children have bonded and become attached. Secondly, we must consider the cultural adjustments that these children, who have not lived in an Indian environment, would have to make and

their individual abilities to make those adjustments, as established by the testimony of qualified expert witnesses. See *In Interest of J.R.H.*, 358 N.W.2d 311 (Iowa 1984).

One of the qualified expert witnesses, Dr. Melton, testified that removing the children from present foster homes and placing them in equally stable foster homes would have significant consequences, would be emotionally upsetting, and would produce psychological disorganization.

Another expert witness, Professor Ann Coyne, specializes in bonding and attachment and in separation and loss, and has experience working with special needs children, tribes, and the Department of Social Services. She explained the nature of bonding and that the consequences of breaking attachments for children include short-term memory deficits, speech and language problems, and posttraumatic stress that manifests itself in children as depression and difficulty in relating to others. As Professor Coyne testified, "[F]or a child, there's nothing more desparate [sic] than to be removed from the person to whom they are attached." Professor Coyne testified that the grief process in children takes at least 6 to 8 years from the time of the loss and that, in this case, transfer to the tribe and the inevitable grief over losing their psychological parents would compromise the children's ability to benefit from that culture because they would be too busy grieving and dealing with the loss of the attachment.

From the beginning, the mother refused to allow transfer of her children's cases to the tribal court and demanded that her children be placed in non-Indian homes. While she may be entitled to change her mind, we cannot and will not close our eyes to the extensive bonding and attachment these children have experienced with the foster families who now wish to adopt them, in the 7 years the mother has adhered to her initial position.

Although we realize that the guidelines deem inappropriate considerations of tribal socioeconomic considerations and the perceived adequacy of the tribal or Bureau of Indian Affairs social services or judicial systems, we also recognize that, in the case of two of the children, those considerations become necessary to a determination of the best interests of the children

and, therefore, "good cause" not to transfer the case. Both C.W. and M.W. are mentally handicapped and have special needs which the law specifically requires that we consider. See 25 U.S.C. § 1915 (b). See, also, 44 Fed. Reg. 67,584, 67,594 (1979). The children will suffer if their respective foster homes, the only stability they have ever known, are taken away from them.

The judgment terminating parental rights is affirmed. That part of the court's judgment transferring custody to the Rosebud Sioux Tribal Court for disposition is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

SHANAHAN, J., concurring.

Although the result reached today by the majority of this court is correct, I disagree with the majority's route to that result.

While the majority reiterates that "the Nebraska Evidence Rules are not applicable in a dispositional hearing, including a hearing to terminate parental rights," the majority, nevertheless, proceeds to discuss the admissibility of testimony from Dr. Gary Melton, a psychologist, and concludes that Melton's testimony is admissible because he was a witness "qualified to testify as an expert under Neb. Evid. R. 702," which was the trial court's finding on a preliminary question of admissibility and a conclusion which, under the circumstances and the Nebraska Evidence Rules, is not clearly erroneous. The majority's acknowledgment that the Nebraska Evidence Rules are inapplicable in proceedings to terminate parental rights renders the majority's discussion about admissibility of an expert's testimony under the Nebraska Evidence Rules both incongruous and unnecessary. That, however, may be the least incongruous feature of the majority's opinion in this case.

The majority then states that "the Nebraska rules of evidence provide a guidepost" in determining whether evidence adduced over a parent's objection at a hearing to terminate parental rights is reconcilable with procedural due process. The expression about a "guidepost" supplies no answer to the

question: Is application of the Nebraska Evidence Rules necessary for procedural due process in a hearing to terminate parental rights under the Nebraska Juvenile Code?

To answer the preceding question about procedural due process, we must operate from two premises. First, the parent-child relationship is accorded due process protection. Second, rules of evidence are reliable standards for presentation of information to produce reasonably trustworthy resolutions of controversies submitted to the judicial process.

Support for our first premise is found in decisions by the U.S. Supreme Court as well as decisions of this court. *Lassiter v. Department of Social Services*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981), involved due process considerations for proceedings to terminate parental rights. In *Lassiter*, the Court observed:

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U. S. 886, 895. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

452 U.S. at 24-25.

The *Lassiter* Court continued:

> This Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for and right to "the companionship, care, custody and management of his or her children" is an important interest that "undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley v. Illinois*, 405 U. S. 645, 651. Here the State has sought not simply to infringe upon that interest, but to end it. If the State prevails, it will have worked a unique kind of

> deprivation. . . . A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one.

452 U.S. at 27.

Shortly after *Lassiter*, the Supreme Court decided *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). The Court remarked:

> In *Lassiter*, it was "not disputed that state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause." [Citations omitted.] The absence of dispute reflected this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment. [Citations omitted.]
>
> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

455 U.S. at 753-54. Further, in *Santosky*, the Court noted:

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss.' " [Citations omitted.] . . .
>
> . . . When the State initiates a parental rights termination proceeding, it seeks not merely to infringe that fundamental liberty interest, but to end it.

455 U.S. at 758-59. Finally, in *Santosky*, the Court concluded that "the child and his parents share a vital interest in preventing erroneous termination of their natural

relationship." 455 U.S. at 760.

In other decisions, the Supreme Court has indicated that a state may not constitutionally terminate parental rights without showing parental unfitness. See *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978):

> We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected....
>
> We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest." *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863 (1977) (Stewart, J., concurring in judgment).

See, also, *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972) (the integrity of the family unit is protected by the due process clause of the fourteenth amendment); *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991) (the parent-child relationship involves a liberty interest).

The Supreme Court's views concerning the requirement of due process for a hearing to terminate parental rights, expressed in *Santosky v. Kramer, supra*, and *Lassiter v. Department of Social Services, supra*, have been adopted by this court regarding the Nebraska Juvenile Code. See, *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251, 417 N.W.2d 147 (1987); *In re Interest of L.J., J.J., and J.N.J.*, 220 Neb. 102, 368 N.W.2d 474 (1985). Thus, a parent has a fundamental interest in avoiding erroneous termination of parental rights. See, *Smith v. Organization of Foster Families*, 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977); *Santosky v. Kramer, supra*.

Having concluded that the parent-child relationship is an interest which is entitled to due process protection, we must now decide whether current Nebraska procedure affords that constitutional protection or, as the Supreme Court expressed in *Smith v. Organization of Foster Families, supra*:

> Where procedural due process must be afforded because a "liberty" or "property" interest is within the

> Fourteenth Amendment's protection, there must be determined "what process is due" in the particular context. . . .
>
> . . . "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U. S. 471, 481 (1972).

431 U.S. at 847-48.

Under 25 U.S.C. § 1912(f) (1988) of the U.S. Indian Child Welfare Act and Neb. Rev. Stat. § 43-1505(6) (Reissue 1988) of the Nebraska Indian Child Welfare Act, a determination to terminate parental rights must be "supported by evidence beyond a reasonable doubt." However, in proceedings that are not subject to the federal and Nebraska Indian Child Welfare Acts, "termination of parental rights is permissible when the basis for such termination is proved by clear and convincing evidence." *In re Interest of T.C.*, 226 Neb. 116, 117, 409 N.W.2d 607, 609 (1987). Accord, *In re Interest of M.P.*, 238 Neb. 857, 472 N.W.2d 432 (1991); *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990); *In re Interest of L.H.*, 227 Neb. 857, 420 N.W.2d 318 (1988). See, also, *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).

In *In re Interest of J.S., A.C., and C.S., supra*, we noted that the Nebraska Evidence Rules do not apply in a dispositional hearing for a child under the Nebraska Juvenile Code because the foremost purpose or objective of the code is promotion and protection of a juvenile's best interests and, therefore, "[t]o accomplish such goal and fashion a dispositional remedy beneficial to the juvenile, a judge should have access to the best available evidence which is relevant, reliable, and trustworthy concerning a correct disposition for the juvenile." 227 Neb. at 263, 417 N.W.2d at 156.

While Neb. Rev. Stat. § 43-283 (Reissue 1988) states, "Strict rules of evidence shall not be applied at any dispositional hearing," we have concluded that the "rules of evidence" mentioned in § 43-283 are the Nebraska Evidence Rules. See *In re Interest of J.S., A.C., and C.S., supra*. However, one readily notes that § 43-283 does not contain a definition or characterization for "dispositional hearing," and employs language identical to its statutory predecessor, § 43-206.03(4)

(Reissue 1978): "Strict rules of evidence shall not be applied at any dispositional hearing." Legislative history for § 43-283 (Reissue 1988) and § 43-206.03(4) (Reissue 1978) supply no information or indication of the Legislature's intent for the meaning of "dispositional hearing." Rather, the first one encounters "dispositional hearing" in relation to proceedings to terminate parental rights and applicable rules of evidence is in *State v. Bailey*, 198 Neb. 604, 254 N.W.2d 404 (1977), when this court, without explanation for its conclusion, stated:

> Appellants urge that their objections should have been sustained and that the exhibits should not have been received or considered. Section 43-206.03(4), R. S. Supp., 1976, provides that strict rules of evidence shall not be applied at any dispositional hearing. Under such a statute, the Juvenile Court may exercise a sound discretion in respect to determining the relevancy, competency, and admissibility of testimony to be considered at a dispositional hearing. We find no abuse of discretion by the Juvenile Court.

198 Neb. at 608, 254 N.W.2d at 407. The preceding pronouncement regarding admissibility of evidence was thereafter confirmed during review of a judgment terminating parental rights in *State v. Duran*, 204 Neb. 546, 552, 283 N.W.2d 382, 386 (1979), when the court expressed:

> We first point out that section 43-206.03(4), R. R. S. 1943, provides that strict rules of evidence shall not apply at any dispositional hearing. As we have previously stated, the juvenile court may exercise a sound discretion in determining the relevancy, competency, and admissibility of evidence to be considered at a dispositional hearing. State v. Bailey, 198 Neb. 604, 254 N.W.2d 404 (1977).

Thus, *Bailey* and *Duran* began a line of Nebraska decisions, which includes today's decision, in repeated reaffirmation that the Nebraska Evidence Rules do not apply at a hearing to terminate parental rights. Thus, inapplicability of the Nebraska Evidence Rules at a hearing to terminate parental rights is not the result of a legislatively expressed directive, but originated and has evolved through judicial interpretation of statutes pertaining to rules of evidence at a hearing to terminate

parental rights as a "dispositional hearing." It is quite likely that the Legislature, when enacting § 43-283, envisioned that a "dispositional hearing" meant a hearing for personal disposition of a child who is subject to the Nebraska Juvenile Code, and very unlikely that the Legislature viewed the parent-child relationship as so insignificant or valueless that the relationship might be extinguished on the basis of unreliable or untrustworthy information presented to a court.

Because the parent-child relationship is entitled to protection of due process and, further, since a parent has a recognized interest in avoiding an erroneous termination and extinction of that valuable right and relationship, Nebraska procedure for a hearing to terminate parental rights must provide reasonable assurance that a parent may avoid an erroneous termination of parental rights, and further requires that parental unfitness, as a prerequisite to termination of parental rights, be established by proof that is clear and convincing unless the proceeding is governed by the federal or Nebraska Indian Child Welfare Act, in which case proof must be beyond a reasonable doubt. Notwithstanding prior decisions of this court interpreting § 43-283 and reaffirming inapplicability of the Nebraska Evidence Rules in a hearing to terminate parental rights, due process requires a procedure that reduces the risk of a parental rights termination resting on erroneous information presented to a juvenile court and that promotes production of proof which is clear and convincing or, in proceedings subject to the federal or Nebraska Indian Child Welfare Act, proof which is beyond a reasonable doubt. Certainly, application of the Nebraska Evidence Rules as reliable standards for presentation of information at a hearing to terminate parental rights is a step in the right direction for reducing the risk of an erroneous extinguishment of parental rights and will tend to supply courts with trustworthy information for resolving a question about parental unfitness, a resolution which must be made through proof which is clear and convincing or, in proceedings governed by the federal or Nebraska Indian Child Welfare Act, proof which is beyond a reasonable doubt. Additionally, application of the Nebraska Evidence Rules should eliminate horrible hearsay, see *In re Interest of J.S., A.C., and C.S.*, 227 Neb. 251,

417 N.W.2d 147 (1987), wading through dozens of documents, see *In re Interest of A.H.*, 237 Neb. 797, 467 N.W.2d 682 (1991), and a jumble of judicial notice, see *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990), which seem to be ever-present problems in hearings to terminate parental rights.

Consequently, in accordance with due process under Neb. Const. art. I, § 3, the time has come to require that the Nebraska Evidence Rules shall be applied in a hearing to terminate parental rights, a requirement which will supply reliable and express standards for production of reasonably trustworthy information to resolve controversies between the State of Nebraska and one whose parental rights are sought to be terminated under the Nebraska Juvenile Code. Thus, while due process may never be precisely defined, fundamental fairness requires and exists in reducing the risk of an erroneous termination of parental rights through unreliable and untrustworthy information presented to a juvenile court. For that reason, the Nebraska Evidence Rules, as an aspect of due process, should apply at a hearing to terminate parental rights.

In the present case, when the Nebraska Evidence Rules are applied, the State presented sufficient admissible evidence to demonstrate, beyond a reasonable doubt, that termination of parental rights was required under the circumstances, the conclusion reached by the trial court and this court; hence, the trial court's judgment must be affirmed.

CAPORALE, J., joins in this concurrence.

MARY M. PATTRIN, NOW KNOWN AS MARY M. LAUX, APPELLEE, V. STEPHEN M. PATTRIN, JR., APPELLANT.

479 N.W.2d 122

Filed January 24, 1992. No. 89-768.

1. **Modification of Decree: Child Custody: Child Support: Visitation: Proof.** A party seeking to modify a marital dissolution decree concerning custody, support, or visitation of a child has the burden to show a material change of circumstances affecting the best interests of the child.
2. **Child Support: Modification of Decree: Rules of the Supreme Court.** Adoption of the Nebraska Child Support Guidelines, effective October 1, 1987, constitutes a material change of circumstances to justify modification of a child support order entered before October 1, 1987.
3. **Child Support: Divorce.** As a result of Neb. Rev. Stat. § 42-364(4) (Reissue 1988), only parents may be ordered to pay child support or expenses for child care pursuant to a decree of marital dissolution.

Appeal from the District Court for Douglas County: JERRY M. GITNICK, Judge. Affirmed as modified.

Thomas J. Young, of Young & LaPuzza, for appellant.

Albert L. Feldman and Brent M. Kuhn, of Harris, Feldman, Stumpf Law Offices, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

Stephen M. Pattrin, Jr., appeals from the order of the district court for Douglas County which increased Pattrin's monthly child support payment from $150 to $382.50 per month and required him to pay $32 per month in child-care expenses in addition to the child support obligation. Stephen Pattrin contends that the district court erred by (1) finding that there was a material change in circumstances that justified modification of his support obligation and (2) requiring him to pay child-care expenses for the 6-year-old daughter born to Mary M. Laux, formerly Mary M. Pattrin, during her marriage subsequent to the divorce from Stephen Pattrin.

STANDARD OF REVIEW

"A party seeking to modify a marital dissolution decree concerning custody, support, or visitation of a child has the

burden to show a material change of circumstances affecting the best interests of the child." *Schulze v. Schulze*, 238 Neb. 81, 84-85, 469 N.W.2d 139, 142 (1991). Accord, *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990); *Christen v. Christen*, 228 Neb. 268, 422 N.W.2d 92 (1988).

> In an appeal involving an action for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.

Huffman v. Huffman, 232 Neb. 742, 747-48, 441 N.W.2d 899, 903-04 (1989). Accord, *Schulze v. Schulze, supra*; *Ritter v. Ritter*, 234 Neb. 203, 450 N.W.2d 204 (1990); *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988).

CHILD SUPPORT AWARD

The marital dissolution decree for Mary and Stephen Pattrin was entered on February 6, 1980, and required that Stephen pay $150 per month for each of Pattrins' three children, whose custody was granted to Mary Pattrin, namely, Stephen, Jodi, and Ryan Pattrin. On July 9, 1985, the dissolution decree was modified so that custody of Jodi was placed with her father, Stephen, while custody of Ryan remained with Mary Pattrin. Apparently, Pattrins' son Stephen was no longer legally affected by the dissolution decree, since the 1985 modification did not refer to custody or support for the child Stephen. Otherwise, the 1980 dissolution decree remained unchanged regarding child support for Ryan Pattrin.

Pursuant to action by this court, the Nebraska Child Support Guidelines became effective October 1, 1987.

Mary Laux, formerly Mary Pattrin, on March 8, 1989, requested a modification of the dissolution decree and an increase in child support for Ryan Pattrin in conformity with the Nebraska Child Support Guidelines. After a hearing, the

court modified Stephen's support obligation and, in view of the child support guidelines, increased Stephen's child support payment from $150 to $382.50 per month for Ryan Pattrin.

Stephen Pattrin does not contest the factual basis for the district court's findings regarding child support or the court's computation of child support in conformity with the Nebraska Child Support Guidelines; rather, Stephen Pattrin questions whether the child support guidelines, which became effective on October 1, 1987, constitute a material change of circumstances, required for modification of a previously ordered child support obligation, or, as expressed by Stephen Pattrin:

> The theory upon which this case was tried to the lower court was that the child support guidelines instituted by the Nebraska Supreme Court were sufficient justification for a modification of the Decree herein with regard to child support, assuming that the use of such schedules would evidence a different amount of child support to be paid than that evidenced in the decree.

Brief for appellant at 6-7.

As this court stated in *Schmitt v. Schmitt, ante* p. 632, 637, 477 N.W.2d 563, 566 (1991), "adoption of the Nebraska Child Support Guidelines effective October 1, 1987, constituted a material change of circumstances sufficient to justify consideration of proposed modification of child support orders entered before that date." Accord *Phelps v. Phelps, ante* p. 618, 477 N.W.2d 552 (1991). Consequently, the Nebraska Child Support Guidelines are a material change in circumstances for modification of Stephen Pattrin's child support obligation expressed in the 1980 marital dissolution decree. For that reason, we affirm the district court's modification of the marital dissolution decree concerning child support payments for Ryan Pattrin.

CHILD-CARE EXPENSES

The district court also found that Mary Laux "is expending as child care expenses for the minor child born of this marriage the sum of $32 per month, which sum represents child care expenses incurred by the petitioner to enable her to visit her

doctor for medical examinations and treatments." However, as a result of our de novo review of the record, we find that the child-care expenses questioned in this appeal were in fact incurred for Mary Laux's minor daughter born of the Laux marriage subsequent to the Pattrin divorce. On direct examination during the modification hearing, Mary Laux testified:

> Q. And have you since remarried?
>
> A. Yes.
>
> Q. And do you have children as a result of your new marriage?
>
> A. Yes, I have one.
>
> Q. And how old is she?
>
> A. She is six.
>
> Q. Is she in your custody?
>
> A. Yes.
>
> . . . .
>
> Q. About how often would you have a doctor's appointment?
>
> A. Usually twice a week.
>
> Q. And since you have a six-year-old daughter, do you have to have a sitter for that?
>
> A. Yes, I do.
>
> Q. And what does the sitter cost you per hour?
>
> A. Usually around $2 an hour.
>
> . . . .
>
> Q. . . . [I]n regard to child care, does the $32 a month represent the child care that you will have to spend in order to make your physicians' appointments?
>
> A. Yes.

Thus, evidence at the modification hearing clearly and indisputably established that Stephen Pattrin is not the father of Mary Laux's 6-year-old daughter. Under Nebraska law, only parents may be ordered to pay child support or expenses for child care pursuant to a decree of marital dissolution. See Neb. Rev. Stat. § 42-364(4) (Reissue 1988): "[C]hild support [is] to be paid by a parent . . . ." See, also, Nebraska Child Support Guidelines, paragraph A: "The main principle behind these guidelines is to recognize the equal duty of both parents to

contribute to the support of their children in proportion to their respective net incomes." On the basis of the record presented, Stephen Pattrin has no legal responsibility to pay child support or child-care expenses for Mary Laux's daughter because he is not a parent of the child. Hence, the district court abused its discretion in requiring that Stephen Pattrin pay child-care expenses concerning Mary Laux's daughter. Therefore, we modify the judgment of the district court by deleting from the district court's order any requirement that Stephen Pattrin pay $32 per month for child-care expenses of Mary Laux's daughter.

Although we have considered the matter of an attorney fee regarding counsels' representation in this court, we decline to order any attorney fee concerning the proceedings in this court.

AFFIRMED AS MODIFIED.

CAPORALE, J., not participating in the decision.

DIANE GOWENS, APPELLANT, V. BOARD OF EDUCATION OF DISTRICT NO. 54, RALSTON PUBLIC SCHOOLS, DOUGLAS COUNTY, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEE.

479 N.W.2d 440

Filed January 24, 1992. No. 90-076.

Appeal from the District Court for Douglas County: DONALD J. HAMILTON, Judge. Reversed and remanded.

R.E. Richards, of Richards & Richards, for appellant.

Kelley Baker, of Harding & Ogborn, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ.

PER CURIAM.

This matter arises from the sustaining of a demurrer in the district court to appellant's petition, in which she named as defendant the board of education of the Ralston schools. The

trial court dismissed the petition. Gowens appeals.

Our recent decision in *Zyburo v. Board of Education, ante* p. 162, 474 N.W.2d 671 (1991), is dispositive. The issue in this case is therefore resolved in favor of appellant, and we reverse the order of dismissal and remand the matter to the district court for consideration consistent with this opinion.

REVERSED AND REMANDED.

GRANT, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL G. MASAT, APPELLANT.
479 N.W.2d 131

Filed January 24, 1992. No. 90-904.

1. **Motions to Suppress: Appeal and Error.** In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold a trial court's findings of fact unless those findings are clearly erroneous.
2. _____: _____. In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion.
3. **Police Officers and Sheriffs: Arrests: Jurisdiction.** The power of a police officer at common law to make an arrest without a warrant is limited to the boundaries of the governmental unit by which he was appointed, unless the police officer is acting in fresh and continued pursuit of a suspected felon who has committed an offense in the officer's presence and within his territorial jurisdiction.
4. **Police Officers and Sheriffs: Arrests: Jurisdiction: Statutes.** A local peace officer acting without a warrant outside the territorial limits of the jurisdiction under which he holds office is without official power to apprehend a suspected misdemeanor offender unless he is authorized to do so by statute.
5. **Criminal Law: Arrests.** Although the illegality of an arrest gives rise to collateral rights and remedies such as the exclusionary rule, it ordinarily is not a defense to the crime for which the arrest is made.
6. **Criminal Law: Arrests: Evidence.** The illegality of an arrest does not deprive the State of an opportunity to prove guilt through the introduction of untainted evidence.

Appeal from the District Court for Pierce County, MERRITT C. WARREN, Judge, on appeal thereto from the County Court for Pierce County, PHILIP R. RILEY, Judge. Judgment of District

Court reversed, and cause remanded with directions.

Scott D. Freese, of Hutton, Freese & Remmich, for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Claiming that the trial court erred in failing to suppress certain evidence obtained after he was arrested outside the arresting officer's jurisdiction, Michael G. Masat appeals his misdemeanor conviction of second-offense driving while under the influence of alcohol.

The defendant was originally convicted in the county court and appealed his conviction to the district court for Pierce County, where it was affirmed. He then appealed to this court.

In light of our decision in *State v. Tingle*, *ante* p. 558, 477 N.W.2d 544 (1991), we reverse Masat's conviction and remand the cause to the district court with instructions to remand it to the Pierce County Court for a new trial.

Prior to his jury trial, Masat timely filed a motion which in relevant part asked the court to suppress

> all evidence from and after the arrest of this Defendant which took place approximately two and one-half (2 1/2) miles west of Plainview, Nebraska, for the reason that said arrest was illegally made as the arresting officer, Plainview Police Officer Darrel D. Grebe, was outside his jurisdiction as of the time of the making of the arrest.

After an evidentiary hearing, the trial court denied Masat's motion to suppress. At Masat's jury trial, the judge overruled the defendant's objections to any observations Officer Grebe made outside Plainview's city limits and to "any evidence that Mr. Grebe may testify to relative to his stop and subsequent arrest of Mr. Masat." A continuing objection to each question regarding that "entire line of testimony" was permitted.

The record reflects that on January 21, 1990, Grebe was a part-time police officer with the Plainview Police Department.

Grebe testified that when he was working as a police officer, his patrol area did not extend beyond Plainview's city limits. About 7:45 p.m. on January 21, while in uniform and on duty as a police officer, Grebe observed Masat's automobile at the intersection of West Street and Highway 20, within the Plainview city limits. Grebe testified that as the defendant's vehicle turned left onto Highway 20 to proceed in a westerly direction, it "bounced very sharply against the curb" of the highway. Grebe followed Masat's vehicle as it proceeded beyond the city limits of Plainview, beyond the Pierce County border, and into Antelope County, where he arrested the driver, Masat. While following Masat from the point of his first observation to the point of Masat's arrest, Grebe noted that Masat's vehicle violated the posted speed limit and crossed the centerline of Highway 20 on two occasions. On one of those occasions an oncoming automobile left the highway to avoid an accident. Grebe stopped Masat in Antelope County and arrested the defendant for driving while under the influence of alcohol. Grebe returned Masat to Plainview, where he obtained a breath alcohol test at 8:40 p.m. reflecting that Masat had a concentration of .281 grams by weight of alcohol per 210 liters of his breath, in violation of Neb. Rev. Stat. § 39-669.07(3) (Reissue 1988).

In his appeal to this court, the defendant argues only that because he was illegally arrested, the trial court should have excluded from his trial breath alcohol test results, observations of Masat following his arrest, and any statements of the defendant following his arrest.

In determining the correctness of a trial court's ruling on a motion to suppress, an appellate court will uphold a trial court's findings of fact unless those findings are clearly erroneous. *State v. Groves*, *ante* p. 660, 477 N.W.2d 789 (1991). In deciding whether the trial court's findings on a motion to suppress are clearly erroneous, the reviewing court recognizes the trial court as the finder of fact and takes into consideration that the trial court has observed the witnesses testifying regarding the motion. *Id.*

The power of a police officer at common law to make an arrest without a warrant is limited to the boundaries of the

governmental unit by which he was appointed, unless the police officer is acting in fresh and continued pursuit of a *suspected felon* who has committed an offense in the officer's presence and within his territorial jurisdiction. *State v. Tingle, supra.* A local peace officer acting without a warrant outside the territorial limits of the jurisdiction under which he holds office is without official power to apprehend a suspected misdemeanor offender unless he is authorized to do so by statute. See *State v. Tingle, supra.* There is no Nebraska statute authorizing a police officer appointed by a municipality in Pierce County to make an arrest in Antelope County of a person suspected of committing a misdemeanor within the territorial limits of the municipality that appointed the officer. In Masat's case, there was no warrant, and we need not discuss the officer's jurisdiction or authority under a warrant.

The trial court was clearly wrong in failing to suppress the breath alcohol test results and any observations obtained subsequently to Masat's arrest. Evidence obtained as the fruit of an illegal search or arrest, in violation of the fourth amendment to the U.S. Constitution and the provisions of article I, § 7, of the Nebraska Constitution, is inadmissible in a prosecution in this state and must be excluded. *State v. O'Kelly*, 175 Neb. 798, 124 N.W.2d 211 (1963). See, also, *Bissonette v. Haig*, 800 F.2d 812 (8th Cir. 1986).

Although the illegality of an arrest gives rise to collateral rights and remedies such as the exclusionary rule, it ordinarily is not a defense to the crime for which the arrest is made. *State v. Tingle*, *ante* p. 558, 477 N.W.2d 544 (1991). The illegality of an arrest does not deprive the State of an opportunity to prove guilt through the introduction of untainted evidence. See, *State v. Tingle, supra*; *State v. Smith*, 207 Neb. 263, 298 N.W.2d 162 (1980).

We vacate Masat's sentence, reverse his conviction, and remand the cause for a new trial consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. JOHN W. KING, APPELLANT.

479 N.W.2d 125

Filed January 24, 1992. No. 90-1056.

1. **Convictions: Sentences: Ordinances: Appeal and Error.** When a defendant appeals a conviction and sentence under a municipal ordinance, claiming that the evidence is insufficient for a conviction and that a sentence is excessive, an appellate court's consideration of the assignments of error requires an examination of the specific ordinance involved.
2. **Ordinances: Presumptions: Judicial Notice: Appeal and Error.** When an ordinance charging an offense is not properly made a part of the record, an appellate court presumes the existence of a valid ordinance creating the offense charged, and an appellate court will not otherwise take judicial notice of the ordinance.
3. **Ordinances: Presumptions: Appeal and Error.** In the absence from the record of the applicable municipal ordinance, an appellate court presumes that the evidence sustains the findings of the trial court and that a sentence is within the limits set out in the applicable ordinance.

Appeal from the District Court for Douglas County, JAMES M. MURPHY, Judge, on appeal thereto from the County Court for Douglas County, THOMAS G. MCQUADE, Judge. Judgment of District Court affirmed.

Barbara Thielen, of Fabian & Thielen, for appellant.

Herbert M. Fitle, Omaha City Attorney, and Gary P. Bucchino, Omaha City Prosecutor, and J. Michael Tesar for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Following a county court bench trial, John W. King was convicted of purposely or knowingly tampering with or damaging the property of another. The property damaged was a truck. King was given a 75-day jail sentence.

Upon King's appeal to the district court for Douglas County, his conviction and sentence were affirmed. The defendant then appealed to this court. Here, King has assigned as error that the evidence was insufficient to sustain his conviction and that the sentence imposed is excessive. We affirm.

King was convicted of violating a municipal ordinance of the

city of Omaha. The penalty was also set out by ordinance. When a defendant appeals a conviction and sentence under a municipal ordinance, claiming that the evidence is insufficient for a conviction and that a sentence is excessive, an appellate court's consideration of the assignments of error requires an examination of the specific ordinance involved. See *State v. Topping*, 237 Neb. 130, 464 N.W.2d 799 (1991). The record before us does not include the ordinance under which King was convicted or the ordinance under which he was sentenced.

When an ordinance charging an offense is not properly made a part of the record, an appellate court presumes the existence of a valid ordinance creating the offense charged, and an appellate court will not otherwise take judicial notice of the ordinance. See *State v. Topping, supra*. In the absence from the record of the applicable municipal ordinance, an appellate court presumes that the evidence sustains the findings of the trial court and that a sentence is within the limits set out in the applicable ordinance. See *State v. Cottingham*, 226 Neb. 270, 410 N.W.2d 498 (1987).

Because there is no municipal ordinance in the record in King's appeal, the order of the district court, affirming the judgment of the county court, is affirmed.

AFFIRMED.

DOROTHY SCHLUP, APPELLEE, V. AUBURN NEEDLEWORKS, INC., APPELLANT.

479 N.W.2d 440

Filed January 24, 1992. No. 90-1264.

1. **Appeal and Error.** This court will not consider assignments of error which are not discussed in the proponent's brief.
2. **Workers' Compensation: Evidence: Appeal and Error.** Findings of fact by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong. In testing the sufficiency of the evidence to support findings of fact made by the court after rehearing, the evidence must be considered in the light most favorable to the successful party. Every controverted fact must be

resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.

3. **Workers' Compensation.** Under the provisions of the Workers' Compensation Act, compensation is allowed when personal injury is caused to an employee by an accident or occupational disease, arising out of and in the course of his or her employment, if the employee was not willfully negligent at the time of receiving such injury.
4. _____. While it is quite clear that a condition resulting from the cumulative effects of repeated work-related trauma has some characteristics of both an accidental injury and an occupational disease, the compensability of a condition resulting from the cumulative effects of repeated work-related trauma is to be tested under the statutory definition of accident.
5. **Workers' Compensation: Words and Phrases.** An accident is defined in the Nebraska Workers' Compensation Act as an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury.
6. _____: _____. For purposes of the Nebraska Workers' Compensation Act, "suddenly and violently" does not mean instantaneously and with force. The specification of suddenly and violently is satisfied if the injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment.
7. **Workers' Compensation.** The third specification in Neb. Rev. Stat. § 48-151(2) (Reissue 1988), that the accident produce objective symptoms, is satisfied if the symptoms manifest themselves according to the natural course of such things without any independent intervening cause.
8. **Workers' Compensation: Proof.** To recover compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability. The injured worker must show, by a preponderance of the evidence, that the employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act.
9. **Workers' Compensation.** Whether a plaintiff in a Nebraska workers' compensation case is totally and permanently disabled is a question of fact.
10. **Workers' Compensation: Words and Phrases.** Total and permanent disability contemplates the inability of the worker to perform any work which he or she has the experience or capacity to perform. It does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do.
11. **Workers' Compensation: Proof.** A claimant is entitled to an award under the Workers' Compensation Act for a work-related injury and disability if the claimant shows, by a preponderance of evidence, that the claimant sustained an injury and disability proximately caused by an accident which arose out of and in the course of the claimant's employment, even though a preexisting disability or condition has combined with the present work-related injury to produce the

disability for which the claimant seeks an award.

12. **Workers' Compensation.** Total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Jill Gradwohl Schroeder, of Baylor, Evnen, Curtiss, Grimit & Witt, for appellant.

J. Michael Fitzgerald, of Carpenter, Rowen & Fitzgerald, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Auburn Needleworks, Inc., appeals a Nebraska Workers' Compensation Court finding that the appellee, Dorothy Schlup, was rendered totally and permanently disabled as a result of an accident arising out of and in the course of her employment at the appellant's factory.

We affirm the decision of a three-judge panel of the Workers' Compensation Court.

In summary, Auburn Needleworks claims that the Workers' Compensation Court erred in finding that Schlup (1) was involved in an accident arising out of and in the course of her employment with Auburn Needleworks; (2) had "right and left wrist [sic] problems" as a result of the accident; (3) was permanently and totally disabled and entitled to workers' compensation benefits as a result of her accident; and (4) is entitled to benefits in excess of those provided for the loss of two members of her body, if in fact she is entitled to workers' compensation benefits for being totally and permanently disabled.

Auburn Needleworks has claimed the Workers' Compensation Court erred in awarding Schlup medical and

hospital expenses, but has failed to argue that assignment of error. This court will not consider assignments of error which are not discussed in the proponent's brief. See *State v. Spiegel, ante* p. 233, 474 N.W.2d 873 (1991).

STANDARD OF REVIEW

> Findings of fact by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong. . . . In testing the sufficiency of the evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. . . . Every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.

Cline v. County Seat Lounge, ante p. 42, 48, 473 N.W.2d 404, 408 (1991).

FACTS

Schlup, who at the time of trial was 54 years old, had been employed by Auburn Needleworks as a seamstress for 34 years, but left that company's factory work force intermittently to perform other menial labor. Her final employment at the appellant's factory was from 1982 until she left just prior to wrist surgery in June 1987. During her last year at Auburn Needleworks, Schlup performed a different task on the sewing assembly line than she had done previously. This new task required her to attach collars, cuffs, pockets, and zippers to denim jackets and jeans. Schlup had to pull, tug, and push the denim through the sewing machine she used. She also had to lift and carry the bundles of material she sewed, which bundles sometimes weighed up to 20 or 30 pounds.

As relevant here, the appellee's physical complaints began in March or April 1987. It was then that Schlup's fingers began to tingle, hurt, and get numb. Pain shot up both arms above her elbows, compelling her at times to stop work and run warm water over her hands so she could resume her work.

Schlup sought medical attention on May 8, 1987, when she visited Dr. Dana Farris. He diagnosed Schlup's ailment as bilateral carpal tunnel syndrome, which causes pain, numbness, and decreased function of the hands. Subsequently, surgery was performed on each of the appellee's wrists.

Following the two surgeries, one of her surgeons, Dr. Brent Stromberg, opined that Schlup was limited in her ability to work. He testified that Schlup's carpal tunnel syndrome was either caused by or worsened by the repetitive heavy hand motions that she was required to do in her employment. He testified that as a result of her condition, Schlup suffered a 40-percent impairment of each hand, which related to a 15-percent impairment of both upper extremities. Dr. Stromberg gave Schlup a medical release on November 19, 1987, to see how she would do at work. The appellee was able to work for only 1 day, when her hands began to swell and pain again restricted her ability to function. On February 11, 1988, Schlup was diagnosed by Dr. Stromberg as suffering from reflex sympathetic dystrophy in her hands, a physical condition in which pain and discomfort continue even after the initial reason for the pain is resolved.

On June 21, 1988, nearly a year after her surgeries, Dr. Stromberg again released Schlup for work with specific limitations that restricted her from lifting anything in excess of 10 to 15 pounds. Dr. Stromberg's restrictions required the appellee to avoid repetitive hand activities. These restrictions precluded Schlup from returning to employment at the Auburn Needleworks factory. Schlup continued to suffer from bilateral median nerve infirmities and pain, according to Dr. Stromberg.

Schlup testified that she had problems picking up and grasping objects, that she could not pick up a cup of coffee without using both hands, and that most daily household tasks caused her pain.

The appellee underwent occupational and rehabilitation therapy with rehabilitation counselor Jack Greene between September 1988 and May 1990. Greene administered aptitude and ability tests which disclosed that Schlup has extremely limited job-market skills. Wide-range achievement tests placed her at a fifth grade level in reading skills and at a third grade

level in spelling skills. In those skills, Schlup placed in the bottom 1 percent of the population. The testing disclosed that in math skills, the appellee performed at a seventh grade level, or in the bottom 10 percent of the population. Schlup's general aptitude test reflects scores well below average for general learning ability and verbal and numerical aptitudes. The appellee left high school in 1953 in the middle of the 10th grade because she "just couldn't get the hang of it," and has yet to complete her GED. Schlup additionally suffered from severe degenerative disk disease for which she underwent surgery in 1969. Because of her back problems, she is unable to sit for long periods of time and has lifting limitations.

Schlup filed a petition with the Workers' Compensation Court on September 20, 1989, alleging that she sustained carpal tunnel syndrome in an accident on or about May 8, 1987, while engaging in constant repetitive use of her hands in sewing at the Auburn Needleworks. This, she alleged, rendered her permanently and totally disabled. Auburn Needleworks denied the allegations and claimed that any disability suffered by Schlup resulted from an inherent condition not related to the course of her employment. Dr. Stromberg testified that as of August 3, 1988, Schlup had reached maximum medical recovery.

A three-judge panel of the Workers' Compensation Court found:

> [T]he plaintiff was in the employ of the defendant [Auburn Needleworks] as a sewing factory worker and while so employed and on said date and while engaged in the duties of her employment she suffered injuries to both arms as a result of an accident arising out of and in the course of her employment by the defendant when, while plaintiff was using her hands in sewing heavy material, she developed tingling, numbness and pain in both arms to areas above the elbows. As a result of said accident and injury the plaintiff incurred medical and hospital expense and, in accordance with the facts of this case, has been rendered totally and permanently disabled.

The court further found that "[m]easured by the test of employability or impairment of earning power or earning

capacity . . . recently approved at *Heiliger v. Walters [&] Heiliger Electric, Inc.*, 236 Neb. 459, [461] N.W.2d [565] (1990) . . . we have little difficulty in concluding that the plaintiff is permanently and totally disabled."

The court awarded temporary total disability benefits from May 8, 1987, to the date of the hearing on July 23, 1990; permanent total disability benefits from the date of the hearing so long as Schlup remains permanently and totally disabled; and indemnification of Schlup's medical and hospital expenses for her work-related injury. It is these rulings that Auburn Needleworks has appealed.

ACCIDENT

Auburn Needleworks first contends that Schlup did not suffer a work-related accident. Under the provisions of the Workers' Compensation Act, compensation is allowed when personal injury is caused to an employee by an accident or occupational disease, arising out of and in the course of his or her employment, if the employee was not willfully negligent at the time of receiving such injury. Neb. Rev. Stat. § 48-101 (Reissue 1988). In *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 212, 469 N.W.2d 542, 544 (1991), we recognized:

> While it is . . . quite clear that a condition resulting from the cumulative effects of repeated work-related trauma has some characteristics of both an accidental injury and an occupational disease . . . the compensability of . . . a condition [resulting from the cumulative effects of repeated work-related trauma] is to be tested under the statutory definition of accident.

Under Neb. Rev. Stat. § 48-151(2) (Reissue 1988), an accident is defined as "an unexpected or unforeseen injury happening suddenly and violently, with or without human fault, and producing at the time objective symptoms of an injury." See *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982).

The "unexpected or unforeseen" requirement of § 48-151(2) is satisfied if either the cause was of an accidental character or the effect was unexpected or unforeseen. See *McLaughlin v. Self-Insurance Servs.*, 219 Neb. 260, 361 N.W.2d 585 (1985).

There is no indication in the record that Schlup's condition was either expected or foreseeable. While she had complained of pain and weakness in her hands for a time in 1980 and a sprained wrist in 1981, Schlup had no complaints about her upper extremities for 6 years after suffering the sprained wrist. From the evidence, the Workers' Compensation Court could properly conclude that Schlup's bilateral carpal tunnel syndrome which was diagnosed in 1987 was not expected or foreseen. It could also properly conclude that Schlup's 1987 diagnosis was not causally connected with her complaints of 1980 and 1981.

The second specification of § 48-151(2) requires that an employee's injury must occur "suddenly and violently" to be compensable. This court has held that "suddenly and violently" does not mean "instantaneously and with force." The specification "suddenly and violently" is satisfied if the injury occurs at an identifiable point in time, requiring the employee to discontinue employment and seek medical treatment. *Sandel, supra.* In *Hayes v. A.M. Cohron, Inc.*, 224 Neb. 579, 400 N.W.2d 244 (1987), *disapproved on other grounds, Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990), the court noted that the definition of "accident," as used in § 48-101, includes injuries resulting from activities which create a series of repeated traumas ultimately producing disability. The *Sandel* court recognized that the nature of the human body being such as it is, not all injuries to the body are caused instantaneously and with force, but may indeed nevertheless occur suddenly and violently, even though they have been building up for a considerable period of time and do not manifest themselves until they cause the employee to be unable to continue his or her employment. *Id.* This specification of "suddenly and violently" is to distinguish compensable injuries such as those in *Sandel* from chronic conditions which develop over a period of many years where the injury cannot be traced to a particular job or activity of the worker.

Unlike the situation in *Vencil v. Valmont Indus., ante* p. 31, 473 N.W.2d 409 (1991), wherein the claimant's symptoms developed over a period of not less than 7 years and required no

interruption or discontinuance of his employment until almost 10 years had elapsed, here, Schlup's condition manifested itself within less than 3 months, during which time she had to periodically stop her work and run warm water over her hands to relieve the pain in her upper extremities. On May 8, 1987, the pain was severe enough to require Schlup to stop work and seek medical attention. Clearly, there was sufficient evidence for the Workers' Compensation Court to conclude that May 8, 1987, was the identifiable point in time of Schlup's injuries and that the facts surrounding Schlup's injuries satisfied the second requirement of § 48-151(2). The compensation court's decision in Schlup's case is in accord with the decision in *Erving v. Tri-Con Industries*, 210 Neb. 339, 314 N.W.2d 253 (1982). There, an employee suffered from carpal tunnel syndrome for a period of 4 months. The pain began gradually, became worse, and forced Erving to seek medical attention. These facts satisfied the requirement in § 48-151(2) that the injury occur "suddenly and violently."

The third specification in § 48-151(2), that the accident produce objective symptoms, is satisfied if the symptoms manifest themselves according to the natural course of such things without any independent intervening cause. See *Sandel v. Packaging Co. of America*, 211 Neb. 149, 317 N.W.2d 910 (1982).

> " 'We are of the opinion that the expression has a wider meaning, and that symptoms of pain, and anguish, such as weakness, pallor, faintness, sickness, nausea, expressions of pain clearly involuntary, or any other symptoms indicating a deleterious change in the bodily condition may constitute objective symptoms as required by the statute.' "

Sandel, supra at 157, 317 N.W.2d at 915-16.

Schlup clearly manifested such symptoms when she found she could not continue her work without periodically running water over her hands to relieve pain in her upper extremities. The injuries in her upper extremities manifested themselves when her fingers began to tingle, hurt, and get numb, and when pain shot up both arms above her elbows. When she consulted Dr. Farris on May 8, 1987, the doctor found Schlup's grip

strength slightly decreased bilaterally. Through testing, Dr. Farris found objective symptoms of the appellee's bilateral carpal tunnel syndrome. Prior to operating on Schlup's right wrist, Dr. Bruce Miller, a surgeon, also performed tests, including a percussion test around Schlup's wrists. As a result of these objective tests, Dr. Miller diagnosed the appellee as having a typical carpal tunnel syndrome in both her wrists. The facts of this case are sufficient to support the Workers' Compensation Court's finding that Schlup suffered a work-related accident.

WORK-RELATED ACTIVITY

Auburn Needleworks' second issue is whether the injury Schlup suffered was caused by work-related activities. To recover compensation benefits, an injured worker is required to prove by competent medical testimony a causal connection between the alleged injury, the employment, and the disability. See *Hollinger v. Consolidated Motor Freight*, 223 Neb. 449, 390 N.W.2d 518 (1986). The injured worker must show, by a preponderance of the evidence, that the employment proximately caused an injury which resulted in disability compensable under the Workers' Compensation Act. *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990).

Based upon a reasonable degree of medical certainty, Dr. Miller testified that Schlup's bilateral carpal tunnel syndrome was caused by her work at Auburn Needleworks. Dr. Stromberg gave his opinion, based upon a reasonable degree of medical certainty, that Schlup's carpal tunnel syndrome problems were caused by or worsened by the repetitive heavy hand motions that she had to do in her employment. From this evidence the compensation court could properly find that Schlup's bilateral carpal tunnel syndrome was related to her work at Auburn Needleworks.

EXTENT OF DISABILITY

Auburn Needleworks next contends that Schlup is not totally and permanently disabled and that, therefore, she is not entitled to either temporary total or permanent total disability benefits.

This court has long held that whether a plaintiff in a

Nebraska workers' compensation case is totally and permanently disabled is a question of fact. *Paris v. J. A. Baldwin Mfg. Co.*, 216 Neb. 151, 342 N.W.2d 198 (1984). Total and permanent disability contemplates the inability of the worker to perform any work which he or she has the experience or capacity to perform. *Krijan v. Mainelli Constr. Co.*, 216 Neb. 186, 342 N.W.2d 662 (1984). It does not mean a state of absolute helplessness, but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do. *Mata v. Western Valley Packing*, 236 Neb. 584, 462 N.W.2d 869 (1990).

We have also held that a claimant is entitled to an award under the Workers' Compensation Act for a work-related injury and disability if the claimant shows, by a preponderance of evidence, that the claimant sustained an injury and disability proximately caused by an accident which arose out of and in the course of the claimant's employment, even though a preexisting disability or condition has combined with the present work-related injury to produce the disability for which the claimant seeks an award. *Heiliger v. Walters & Heiliger Electric, Inc., supra.*

Under this analysis, the Workers' Compensation Court did not err in looking at Schlup's work-related injury, as well as her existing back limitations and academic shortcomings, in finally determining that she is totally and permanently disabled.

In assessing the extent of Schlup's disablement, the compensation court relied upon *Heiliger v. Walters & Heiliger Electric, Inc., supra* at 470-71, 461 N.W.2d at 574, where we stated:

> "[T]otal disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market. The essence of the test is the probable dependability with which claimant can sell his services in a competitive labor market, undistorted by such factors as business booms, sympathy of a particular employer or friends, temporary

> good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps."

Although Schlup might be physically able to perform some of the requirements of the jobs listed by Greene, the compensation court could properly find that her lack of mental abilities, coupled with her physical limitations, did render her unemployable.

Professor Larson has written that "[u]nder the odd-lot doctrine, which is accepted in virtually every jurisdiction, total disability may be found in the case of workers who, while not altogether incapacitated for work, are so handicapped that they will not be employed regularly in any well-known branch of the labor market." 2 A. Larson, The Law of Workmen's Compensation § 57.51(a) at 10-164.68 (1989). See, e.g., *Odom Const. Co. v. U. S. Dept. of Labor*, 622 F.2d 110 (5th Cir. 1980), *cert. denied* 450 U.S. 966, 101 S. Ct. 1482, 67 L. Ed. 2d 614 (1981) (54-year-old worker with a fourth grade education, no formal technical training, and a work history of jobs requiring heavy arm work was found to be totally and permanently disabled when an accident injured his dominant arm, weakened his grasp, and made it impossible for him to perform jobs he had performed previously). See, also, *Krijan v. Mainelli Constr. Co.*, *supra*; *Mata v. Western Valley Packing*, *supra*.

Professor Larson also states:

> A considerable number of the odd-lot cases involve claimants whose adaptability to the new situation created by their physical injury was constricted by lack of mental capacity or education. This is a sensible result, since it is a matter of common observation that a man whose sole stock in trade has been the capacity to perform physical movements, and whose ability to make those movements has been impaired by injury, is under a severe disadvantage in acquiring a dependable new means of livelihood . . . by comparison, say, with a book salesman who can continue to make commissions after having sustained serious brain injury.

2 A. Larson, *supra*, § 57.51(d) at 10-164.84(24), (37), and (38).

Schlup could easily have been considered by the Workers' Compensation Court to be an odd-lot case. She had few

appreciable academic or vocational skills and could not sit for long periods at a time, and the evidence is substantial that after suffering the bilateral carpal tunnel syndrome, she could no longer earn a living with her hands. Because her hands are her only means of earning a living, she was rendered totally and permanently disabled when her hands and arms were injured.

Appellant's contention that Schlup is not totally disabled is apparently based upon evidence that Dr. Stromberg continues to encourage Schlup to engage in as much activity as she can and that Greene, the rehabilitation counselor, determined that she was qualified to perform a variety of light-duty occupations. This work included being a cashier, cardiac monitor technician, telephone operator, sales clerk, hotel clerk, fast-food worker, and restaurant hostess.

Two other rehabilitation experts, David Hauswald and Alfred Marchisio, testified that because of her lack of appreciable skills and her physical and academic limitations, they doubted Schlup was a candidate for gainful employment. She attempted a job as an insurance telemarketer, but found that not only was she unable to sit for an extended period of time, but she became tonguetied and was unable to talk to the public. Evidence showed that for most of the jobs listed by Greene, the physical limitations regarding use of her hands and her lack of social and academic skills would keep her from being employed.

The Workers' Compensation Court panel found as a fact that Schlup was totally disabled by the injuries to her arms. We cannot say that finding was clearly wrong.

Since we are affirming the Workers' Compensation Court's finding that Schlup was rendered totally and permanently disabled in a work-related accident in the course of her employment at Auburn Needleworks, there is no need to consider appellant's fourth assignment of error, regarding compensation pursuant to § 48-121(3) (Reissue 1988).

Pursuant to Neb. Rev. Stat. § 48-125 (Reissue 1988), appellee is awarded $750 as attorney fees in this court. Appellee is also entitled to interest as provided in § 48-125(2).

AFFIRMED.

BOSLAUGH, J., participating on briefs.

SHANAHAN, J., concurring.

Certainly, Dorothy Schlup's claim is compensable under the Nebraska Workers' Compensation Act, but the majority's view of compensability calls for an explanation, especially in view of *Vencil v. Valmont Indus., ante* p. 31, 473 N.W.2d 409 (1991), decided just a few months ago, when this court rejected compensability of Daniel J. Vencil's claim based on the cumulative effects of repetitive work-related trauma. In *Vencil*, this court rejected compensability because there was no "identifiable moment" which produced objective symptoms requiring medical attention and the interruption or discontinuance of employment. *Id.* at 32, 473 N.W.2d at 411.

Dorothy Schlup based her workers' compensation claim on a "bilateral carpal tunnel syndrome," an injury sustained as the result of her "constant repetitive use of her hands in sewing," which involved Dorothy Schlup's frequently twisting her wrists during protracted periods in her employment at Auburn Needleworks. Daniel Vencil based his claim on injury caused by a work-related accident or an occupational disease attributable to his frequently twisting his back, bending, and stooping in his employment at Valmont. In Dorothy Schlup's case, Auburn Needleworks denied that her injury was "the result of or attributable to any accident or occupational disease."

In a comparison of Dorothy Schlup's injury with the injury of Daniel Vencil, there are some striking and substantial similarities, with one major and crucial dissimilarity:

	DOROTHY SCHLUP	DANIEL VENCIL
Age at injury:	50 years	30 years
Began employment:	1982	1979
Duration of employment:	5 years	10 years
Type of work activity:	Twisting wrists in sewing collars to coat jackets; pulling and pushing bundles of denim weighing 20 to 30 lbs.	Twisting body and back, bending, stooping, and lifting and pushing objects weighing up to 200 lbs.

	DOROTHY SCHLUP	DANIEL VENCIL
First observation of any physical problem:	1987	1986
Diagnosis of physical condition:	Carpal tunnel syndrome	Lumbar disk disease
Nature of injury:	Tissue or structures in carpal tunnel (canal from hand through wrist to arm) enlarge from swelling due to trauma, irritation, or infection; median nerve, which runs from the palm of the hand through the carpal or wrist tunnel into the arm, is "pinched" or compressed by other enlarged tissue in the tunnel; results in pain, numbness in digits, and arm pain	Deterioration of lumbar disk, i.e., deterioration of fibers around disk, allowing disk to "bulge out"; results in pressure on nerves along the spinal column and pain; medically analogous to carpal tunnel syndrome
Medical history:	No prior condition affecting the injury which is the basis for compensation claim	No prior condition affecting the injury which is the basis for compensation claim
Medical causation:	Repetitive motion; heavy hand movement: pronation (palm down) and supination (palm up) in work-related activities	Repetitive motion; heavy lifting, twisting, and bending in work-related activities
Effects of injury:	Weakness in wrist; inability to grasp objects in employment	Weakness in back; inability to lift objects in employment
Medical treatment:	Surgery to alleviate condition	Surgery to alleviate condition
Disability:	Inability to perform employment duties; discontinuance of employment	Inability to perform employment duties; discontinuance of employment
"Identifiable moment" of injury, i.e., a specific traumatic incident:	None	None
Compensability:	Yes	No

Thus, Dorothy Schlup experienced carpal tunnel syndrome, "a complex of symptoms resulting from compression of the median nerve in the carpal tunnel, with pain and burning or tingling paresthesias in the fingers and hand, sometimes extending to the elbow." The Sloane-Dorland Annotated

Medical-Legal Dictionary 689 (1987).

Neb. Rev. Stat. § 48-151(3) (Reissue 1988) states:

> The term occupational disease shall mean only a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment and shall exclude all ordinary diseases of life to which the general public is exposed.

In *Maxson v. Michael Todd & Co.*, 238 Neb. 209, 212, 469 N.W.2d 542, 544 (1991), this court recognized the following definition for "disease": " '[A]n impairment of the normal state of the living animal . . . body or of any of its components that interrupts or modifies the performance of the vital functions, being a response to environmental factors [such as] industrial hazards . . . .' " The preceding definition substantially coincides with the standard medical definition of "disease," namely: "[A]ny deviation from or interruption of the normal structure or function of any part, organ, or system (or combination thereof) of the body that is manifested by a characteristic set of symptoms and signs and whose etiology, pathology, and prognosis may be known or unknown." Dorland's Illustrated Medical Dictionary 385 (26th ed. 1981). Also, from a medical standpoint, an "occupational disease" is "due to factors involved in one's employment, e.g., various forms of pneumoconiosis or dermatitis." *Id.* at 392. Thus, an occupational disease is a condition which causes impairment, deviation, or interruption of the normal structure or function of a worker's body and which results from hazards or conditions peculiar to a particular occupation or employment. See *Vencil v. Valmont Indus.*, *ante* p. 31, 473 N.W.2d 409 (1991) (Shanahan, J., dissenting).

Several courts, construing workers' compensation statutes with language identical or substantially similar to that in § 48-151(3), have concluded that injury and disability attributable to carpal tunnel syndrome which is causally related to work activities is compensable as an "occupational disease"; for instance, see, *Lettering v. Guy*, 321 Md. 305, 582 A.2d 996 (1990); *Kinney v. Tupperware Co.*, 117 Idaho 765, 792 P.2d 330 (1990); *Wood v. Allison Apparel Marketing, Inc.*, 11 Va. App.

352, 398 S.E.2d 110 (1990); *Johnson v. Spectra Physics*, 77 Or. App. 1, 712 P.2d 125 (1985), *aff'd in relevant part* 303 Or. 49, 733 P.2d 1367 (1987); *Finch v. Stayton Canning Co.*, 93 Or. App. 168, 761 P.2d 544 (1988); *Segar v. Garan, Inc.*, 388 So. 2d 164 (Miss. 1980); *Prater v. Thorngate, Ltd.*, 761 S.W.2d 226 (Mo. App. 1988) (rehearing or transfer to Supreme Court of Missouri denied December 14, 1988); and *Jackson v. Risby Pallet and Lumber Co.*, 736 S.W.2d 575 (Mo. App. 1987) (rehearing or transfer to Supreme Court of Missouri denied September 8, 1987).

Referring to the comparison between the injuries and disabilities of Dorothy Schlup and Daniel Vencil, one immediately sees that Dorothy Schlup's work-related injury consisted of pressure on the median nerve in her carpal tunnel and resulted in her disability, while Daniel Vencil's work-related injury consisted of pressure on the nerves along his vertebral, or spinal, column and resulted in his disability. In both situations, the injury and ultimate disability were attributable to repetitive trauma sustained during the employee's work-related activities. What is the medical and legal distinction between the work-related injuries of Dorothy Schlup and Daniel Vencil? Is the distinction based on the fact that Dorothy Schlup was employed for 5 years before her disability, whereas Daniel Vencil was employed 10 years before his disability? If so, injury from repetitive trauma during employment less than 5 years is compensable, while injury from repetitive trauma during employment lasting more than 5 years is noncompensable. That infirm distinction might be best characterized as a case of acute arbitrariness. Or does compensability lie in the fact that Dorothy Schlup's injury was to her wrists and arms, whereas Daniel Vencil's injury was to his low back? If the repetitive injury is to an employee's wrist, the claim is compensable, but if the repetitive injury is to the employee's low back, the claim is noncompensable. Well, there you have it; nobody has quite explained it that way before.

Since this court continues to lie in its Procrustean bed made of "repetitive trauma" decisions based on a distorted definition of "accident" in the Nebraska Workers' Compensation Act, one hoped that Dorothy Schlup's case would have afforded

this court an "identifiable moment" for application of "occupational disease," expressed in the Workers' Compensation Act, to injuries and disability from the cumulative effect of repetitive work-related trauma. Nonetheless, one can still hope. Although "[h]ope springs eternal," employees injured by repetitive work-related trauma are a little more mortal and need a remedy under the Nebraska Workers' Compensation Act.

Nevertheless, because Dorothy Schlup clearly established that her injury and disability were attributable to carpal tunnel syndrome as an occupational disease, the judgment of the Workers' Compensation Court is otherwise correct and, therefore, must be affirmed.

WHITE and GRANT, JJ., join in this concurrence.

IN RE INTEREST OF S.R., D.R., AND B.R., CHILDREN UNDER 18 YEARS OF AGE.
STATE OF NEBRASKA, APPELLEE, V. J.R., APPELLANT.

479 N.W.2d 126

Filed January 24, 1992. No. 91-136.

1. **Parental Rights: Appeal and Error.** An appellate court reviews termination of parental rights cases de novo on the record and is required to reach a conclusion independent of the juvenile court's findings, but when the evidence is in conflict, the appellate court considers and may give weight to the fact that the juvenile court observed the witnesses and accepted one version of the facts over another.
2. **Parental Rights: Proof.** In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, termination of parental rights is permissible when the basis for such is proved by clear and convincing evidence.
3. _____: _____. In order to terminate parental rights, it must be established that such is in the child's best interests and that there exists at least one of the grounds enumerated in Neb. Rev. Stat. § 43-292 (Reissue 1988).
4. _____: _____. Although a reasonable plan of rehabilitation is not a prerequisite or condition precedent to the termination of parental rights, noncompliance with such a plan is, in and of itself, a sufficient ground for termination of parental rights, if such is shown to be in the child's best interests.

5. **Constitutional Law: Parental Rights.** The fundamental liberty interest of natural parents in the care, custody, and control of their children does not end simply because they have not been model parents or have lost temporary custody of their children to the State.
6. **Parental Rights.** When parental control fails, the State must play its part as parens patriae.
7. **Constitutional Law: Parental Rights.** Constitutional adjudication pays heed to higher values than speed, efficiency, and efficacy, but such adjudication does not require belaboring the painfully obvious.
8. **Parental Rights.** Children cannot, and should not, be suspended in foster care nor be made to await uncertain parental maturity prior to termination of parental rights.

Appeal from the Separate Juvenile Court of Lancaster County: WILFRED W. NUERNBERGER, Judge. Affirmed.

David A. Battiato, of Burns & Associates, for appellant.

Linda S. Porter, Deputy Lancaster County Attorney, for appellee.

Mary Stoughton Wenzl, guardian ad litem.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

The separate juvenile court terminated the parental rights of the father, J.R., and of the mother, D.R., in and to their three children: S.R., a boy born July 25, 1983; D.R., a girl born October 15, 1984; and B.R., a boy born December 1, 1985. Only the father has appealed, claiming, in summary, that the juvenile court erred by finding that the evidence clearly and convincingly establishes (1) the need for terminating his rights and (2) that such serves the best interests of the children. We affirm.

Apparently because of some event not described in this bill of exceptions of 1,970 1/3 pages, the State first became interested in these children in September 1986. The record does show that the State was concerned about the condition of the home the children occupied and about the physical and medical care they were receiving. In any event, the parents at that time agreed to work with the State on their parenting, budgeting, and housekeeping skills, and the State agreed to provide them with a

family support worker and with the equipment needed to clean the family's house and clothes.

On December 16, 1986, a Lincoln police officer visited the home and found a pile of human feces on the floor and a strong odor of human waste. The children were playing on a carpet which was soaked with human waste and old food items. The food cupboards were roach infested, dirty clothes were scattered everywhere, and the children's room contained a large pile of dried feces and used toilet paper. The bedding in the baby crib was filthy. The children were thereupon placed in temporary emergency foster care.

On December 18, 1986, the State filed a petition asking the juvenile court to assert jurisdiction, alleging that the children lacked proper parental care by reason of the faults and habits of their parents and thus were subject to the juvenile court's jurisdiction under the provisions of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988). More specifically, the petition alleged that the children were improperly clothed, had head lice, were covered with dried feces and food, and emitted a smell of urine. In addition, the petition asserted that the family home was kept in a filthy condition, with feces, garbage, old food, dirty clothes, and other debris scattered throughout, and that it was infested with roaches and other bugs.

The parents admitted these allegations at the adjudication hearing held on December 23, 1986. The juvenile court thereupon took jurisdiction over the children and placed their temporary legal custody with the state Department of Social Services, granting the parents reasonable rights of visitation. At this time, the parents were ordered to correct the conditions of the home.

At the disposition hearing in January 1987, the juvenile court returned the children to the parents and ordered the implementation of a rehabilitation plan which, among other things, required the parents to provide the children with a clean, safe, and stable home and to attend counseling as well as parent training classes. Over the ensuing years, the parents received extensive assistance from the State, including the services of family support workers, placement in parenting classes, and the provision of transportation, food vouchers, appliances, and

cleaning services. For the first several months, a family support worker spent 5 to 7 1/2 hours a day 5 days a week with the parents, working on parenting, home management, and hygiene skills. Despite this assistance, the children had to be removed from their parents' home two more times, first in March 1987, just 3 months after the initial disposition, when the guardian ad litem filed a motion requesting an early review of the case, as two of the children had been hospitalized with shigellosis, "a communicable disease which can be is [sic] contracted by eating food that has been prepared under unsanitary conditions, or by being exposed to infected fecal material . . . ." By December 7, 1987, all three children had again been returned to the parents on a trial basis.

For the next year, the State continued to work with the parents on matters related to cleanliness, medical care, and nutrition. A family support worker spent several hours a day three times per week with the parents. Nonetheless, at the review hearings held in March and September 1988, the State continued to express concerns about the inadequate care the parents gave the children and the unclean conditions of the home. The juvenile court ordered further training.

In December 1988, the guardian ad litem again filed a motion requesting an early review hearing, claiming that the parents' care and supervision of the children was deficient and that the conditions of the home had deteriorated once again. A hearing was held on the motion in January 1989. The testimony revealed that despite the extensive help which had been provided them during the preceding 2 1/2 years, the parents failed to show any consistent or significant improvement in the care of their children or the conditions of their home. The children were once again placed in foster care, where they have remained ever since; the rehabilitation plan designed to reunite the family was continued in full force and effect with a few minor modifications.

From January until May 1989, the parents continued to have supervised visitation with their children. The supervision was provided by a family support worker, who continued to monitor the conditions in the home and provide the parents help with budgeting, meal planning, supervision of the

children, and parenting skills. In May 1989, the father was jailed for failure to pay child support for a child not involved in this action. When he was released from jail 3 weeks later, he returned to the family home to find that the mother had moved out and was living elsewhere with a boyfriend. As of this time, the mother virtually stopped having contact with her children. The father, however, resumed his visitations almost immediately after his release from jail and continued to visit the children at least three times a week for 2 hours at a time.

In August 1989, the father was evicted from the home for nonpayment of rent; he thereafter failed to establish another residence of his own. He spent a few months living with various friends until he began cohabiting with his girl friend and her daughter in October 1989. From October 1989 until May 1990, his visitations with the children were conducted either at his girl friend's or at various public parks. These visitations were, at the father's request, generally supervised by a family support worker. The support worker testified that the father was generally very passive during these visits and had to be consistently prompted to interact with and supervise the children.

At long last, in July 1990, 3 1/2 years after the State first intervened in the children's lives, it filed a motion to terminate the parents' rights under the provisions of Neb. Rev. Stat. § 43-292 (Reissue 1988), alleging that the father substantially and continuously or repeatedly neglected the children and failed to give them necessary parental care and protection, and that he, despite reasonable efforts under the direction of the juvenile court, failed to correct the conditions leading to the December 1986 determination that the children were within the purview of § 43-247(3)(a).

The hearing on the termination petition took place over a period of 7 days during the months of September, October, and November 1990. In addition to the facts above stated, the evidence demonstrated that despite the father's 9 months of steady employment, at which he earned approximately $700 per month, he had not managed to put any money toward establishing a home for the children, this despite the fact that his monthly expenses should have been less than $400. In

addition, there was testimony that there was unlikely to be any improvement in the father's parenting skills, that it was unlikely he would be able to assume proper care of the children, and that there had been no bonding between the father and the children such that the children would be injured by termination of the father's relationship.

On November 26, 1990, the juvenile court entered the order here appealed.

It is well settled that this court reviews termination of parental rights cases de novo on the record and is required to reach a conclusion independent of the juvenile court's findings, but when the evidence is in conflict, this court considers and may give weight to the fact that the juvenile court observed the witnesses and accepted one version of the facts over another. *In re Interest of A.C.*, *ante* p. 734, 478 N.W.2d 1 (1991). See, also, *In re Interest of C.W. et al.*, *ante* p. 817, 479 N.W.2d 105 (1992). In the absence of any reasonable alternative and as the last resort to dispose of an action brought pursuant to the Nebraska Juvenile Code, termination of parental rights is permissible when the basis for such is proved by clear and convincing evidence. *In re Interest of M.P.*, 238 Neb. 857, 472 N.W.2d 432 (1991). In order to terminate parental rights, it must be established that such is in the child's best interests and that there exists at least one of the grounds enumerated in § 43-292. *In re Interest of A.C., supra.* We, independently from the findings of the juvenile court, conclude that the evidence summarized above clearly and convincingly establishes that the statutory grounds asserted by the State for terminating the father's parental rights indeed exist and that the evidence further clearly and convincingly establishes that termination of such rights is in the children's best interests.

The father's suggestion that the evidence is lacking because there is no showing the State has "exhausted all alternatives" can only be described as logically preposterous and legally frivolous. First of all, the requirement is not that all possible alternatives be exhausted, but that *reasonable* efforts be made to reunite the juvenile and his or her family. Neb. Rev. Stat. § 43-246 (Reissue 1988); *In re Interest of M.P., supra.*

The State made extraordinary efforts to reunite the family;

various caseworkers and family support workers literally spent days with the parents over protracted periods of time in an effort to teach them very basic parenting and living skills. The parents were allotted an inordinate amount of time within which to comply with a reasonable plan of rehabilitation calculated to protect the children's safety and welfare by providing them a stable, nurturing, and healthful home. The record clearly and convincingly establishes not only that this was not accomplished, but that there is no reasonable likelihood that the father will ever comply with the plan and become a fit parent. As we have observed in the past, although a reasonable plan of rehabilitation is not a prerequisite or condition precedent to the termination of parental rights, *In re Interest of A.C., supra*, noncompliance with such a plan is, in and of itself, a sufficient ground for termination of parental rights, if such is shown to be in the child's best interests. See *In re Interest of J.R.W.*, 237 Neb. 691, 467 N.W.2d 413 (1991).

The most absurd aspect of this case is that it has taken the system more than half a decade to finally make the determination which should have been obvious as inevitable much earlier in the process. It should certainly have been apparent to any reasonable person long before the guardian ad litem's second intervention in December 1988 that the parents were not likely to ever provide the children with a stable, clean, and safe home in which to grow and mature. Yet, it took the State another year and a half to seek termination of the parents' rights.

As a consequence, the children have been forced to languish for more than 27 percent of their childhood (if childhood can be said to last as long as one's minority) in the clutches of a torpid bureaucracy which was created and is maintained to rescue them and others similarly situated from unfit parents.

To be sure, the fundamental liberty interest of natural parents in the care, custody, and control of their children does not end simply because they have not been model parents or have lost temporary custody of their children to the State. *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). But when parental control fails, the State must play its part as parens patriae. *Schall v. Martin*, 467 U.S. 253, 104 S.

Ct. 2403, 81 L. Ed. 2d 207 (1984). See *In re Interest of R.G.*, 238 Neb. 405, 470 N.W.2d 780 (1991).

We recognize, too, that constitutional adjudication pays heed to higher values than speed, efficiency, and efficacy. *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). But such adjudication does not require belaboring the painfully obvious. When reasonable efforts demonstrate that it is unlikely that a family can be reunited, the perishable nature of childhood requires that that which must be done gets done. As we have observed in the past, children cannot, and should not, be suspended in foster care nor be made to await uncertain parental maturity prior to termination of parental rights. *In re Interest of L.J., M.J., and K.J.*, 238 Neb. 712, 472 N.W.2d 205 (1991).

The record sustaining neither of the father's summarized assignments of error, the judgment of the separate juvenile court is affirmed.

AFFIRMED.

DIANNE CLARISSA DESJARDINS, APPELLEE, V. PHILIP DELPHIN DESJARDINS, APPELLANT.

479 N.W.2d 451

Filed January 31, 1992. No. 89-651.

1. **Modification of Decree: Alimony: Appeal and Error.** The modification of an alimony award is a matter initially entrusted to the discretion of the trial court. On appeal, such decisions are reviewed de novo on the record and are affirmed in the absence of an abuse of discretion.
2. **Modification of Decree: Alimony: Good Cause.** Alimony awards entered pursuant to a consent decree may be modified pursuant to Neb. Rev. Stat. § 42-365 (Reissue 1988), which provides that such orders may be revoked or modified for good cause shown.
3. _____: _____: _____. Good cause is demonstrated by a material change in circumstances, but any changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not justify a change or modification of an order to pay alimony.
4. **Modification of Decree: Alimony.** An increase in income is a circumstance that

may be considered in determining whether alimony should be modified.

5. **Modification of Decree: Judgments.** A consent decree is usually treated as an agreement between the parties. It is accorded greater force than ordinary judgments and ordinarily will not be modified over objection of one of the parties.

Appeal from the District Court for Sarpy County: RONALD E. REAGAN, Judge. Reversed and remanded with directions.

Steven M. DeLaney, of O'Hanlon Law Offices, for appellant.

Steven J. Lustgarten and Michael B. Lustgarten, of Lustgarten & Roberts, P.C., for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The respondent, Philip Delphin Desjardins, appeals the judgment of the district court increasing his alimony obligation from $100 per month to $600 per month.

The modification of an alimony award is a matter initially entrusted to the discretion of the trial court. On appeal, such decisions are reviewed de novo on the record and are affirmed in the absence of an abuse of discretion. *Northwall v. Northwall*, 238 Neb. 76, 469 N.W.2d 136 (1991).

The record shows that the parties were married on June 12, 1959, and had four sons, the youngest of whom was born in October 1965. The marriage was dissolved on December 22, 1971. Pursuant to what is commonly known as a "consent decree," the husband was ordered to pay child support of $100 per month per child until each child was emancipated or reached the age of 21. He was further ordered to pay alimony of $200 per month from January 1, 1972, until September 1, 1972, on which date the alimony obligation would be reduced to $100 per month.

On October 5, 1988, the wife filed an application to modify the decree, asking that the alimony award be increased to $750 per month pursuant to Neb. Rev. Stat. § 42-365 (Reissue 1988). The record shows that she has not remarried, has raised the four children, and has held numerous jobs since 1971, including

fundraising, teaching aerobics classes, office cleaning, and selling real estate. Her Realtor's license is inactive, and she is currently employed as a loan officer at a bank in Bellevue. The wife has net monthly income of approximately $1,068.64, including the alimony payments.

The wife testified that she has used her wages and payments from the husband primarily to raise and educate the parties' four sons, all of whom have college educations. The child support order was terminated on January 28, 1985, after the parties entered into a separate agreement relating to the education and school expenses of the two youngest sons. Apparently, the husband agreed to pay educational expenses plus $150 per month for the two boys, who are presently living with their mother. He testified that he has done "[j]ust that" and has not made any other voluntary payments to the boys.

The husband was a major in the Air Force when the marriage was dissolved. He earned a master's degree in systems management, retired as a colonel after 28 years of service, and has been employed as a financial manager at General Dynamics since November 1983. He testified that he received $10,530.50 gross monthly income as follows: $5,558.33 from current employment, $2,296.15 in pension benefits, $513.75 in VA disability benefits, and $2,162.27 from investments. The husband now lives in San Diego, California, owns a $240,000 house, and has monthly living expenses of $1,622.28.

Alimony awards entered pursuant to a consent decree may be modified pursuant to § 42-365, which provides that such orders may be revoked or modified "for good cause shown." See, *Chamberlin v. Chamberlin*, 206 Neb. 808, 295 N.W.2d 391 (1980); *Cooper v. Cooper*, 219 Neb. 64, 361 N.W.2d 202 (1985); *Sloss v. Sloss*, 212 Neb. 610, 324 N.W.2d 663 (1982). We have said that good cause is demonstrated by a material change in circumstances, but any changes in circumstances which were within the contemplation of the parties at the time of the decree, or that were accomplished by the mere passage of time, do not justify a change or modification of the order. See *Cooper v. Cooper, supra*.

In increasing the husband's alimony obligation from $100 to $600 per month, the district judge found that the evidence in the

case showed a material and substantial change of circumstances not contemplated by the parties, "the disparity in income and income earning capacity being astronomical." The court further stated that "the Respondent may claim that his former wife . . . has no equitable right to share in his continued efforts, hard work and good future, but the Court finds that the fact is, by entry of the Decree as they agreed upon, he gave her this legal right."

There is no evidence in the record tending to show that the wife's situation has materially changed since the original decree was entered. The issue in this case is whether the husband's increase in income, by itself, constitutes a material and substantial change in circumstances, or "good cause," which justifies a modification of the alimony order.

An increase in a party's income is a circumstance that may be considered in determining whether alimony should be modified. *Northwall v. Northwall*, 238 Neb. 76, 469 N.W.2d 136 (1991); *Kelly v. Kelly*, 220 Neb. 441, 370 N.W.2d 161 (1985). However, in recent cases we have considered this factor in conjunction with changes in the other party's situation. See, e.g., *Northwall v. Northwall, supra* (wife alleging that husband's income had increased and that hers had decreased); *Cooper v. Cooper, supra* (increase in wife's income, together with decrease in husband's income, did not justify decreasing husband's total alimony obligation); *Sloss v. Sloss, supra* (no material change in circumstances where both parties' financial conditions improved); *Kelly v. Kelly, supra* (no material change of circumstances existed when wife's return to full-time employment and resulting increase in income were contemplated in the original decree). See, also, *Creager v. Creager*, 219 Neb. 760, 366 N.W.2d 414 (1985); *Sholl v. Sholl*, 216 Neb. 289, 343 N.W.2d 742 (1984).

Although this court has the authority to modify consent decrees, see *Chamberlin v. Chamberlin, supra*, we have held that " '[a] consent decree is usually treated as an agreement between the parties. It is accorded greater force than ordinary judgments and ordinarily will not be modified over objection of one of the parties.' " *Lawson v. Lawson*, 185 Neb. 164, 167, 174 N.W.2d 202, 205 (1970) (quoting *Detter v. Erpelding*, 176

Neb. 600, 126 N.W.2d 827 (1964)).

In the present case, the husband had his college degree before the parties were married. When the original decree was entered, he had served more than one-half the time required in order to be eligible for military retirement. He earned his master's degree after the marriage was dissolved and has displayed a talent for investing his money. When the marriage was dissolved, the parties specifically agreed that the wife would receive $100 per month alimony for life or until she remarried.

Under the circumstances, we find that the trial court abused its discretion in finding the evidence showed a material and substantial change of circumstances not contemplated by the parties at the time of the decree.

The judgment of the district court is reversed, and the cause is remanded with directions to dismiss the wife's application to modify the decree.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. DALE WILCOX, APPELLANT.

479 N.W.2d 134

Filed January 31, 1992. Nos. 90-731, 90-732.

1. **Sentences: Appeal and Error.** In a direct appeal, when a defendant has appealed to correct errors which may have entered into the defendant's conviction or sentence, the Supreme Court is empowered to set aside a sentence and remand for resentencing, when the sentence imposed is unauthorized under law and, therefore, void.
2. **Appeal and Error.** Plain error may be found on appeal when an error, unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process.

Appeal from the District Court for Buffalo County: JOHN P. ICENOGLE, Judge. Affirmed in part, and in part sentence vacated and cause remanded for resentencing.

Gary Hogg, Buffalo County Public Defender, for appellant.

Don Stenberg, Attorney General, and Elaine A. Chapman for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

Dale Wilcox appeals his sentences for two felony convictions, namely, his conviction for issuing a bad check in the amount of $287.49, which is Wilcox's second conviction for issuing a bad check and thus a Class IV felony, see Neb. Rev. Stat. § 28-611(1) and (2) (Reissue 1979), and his conviction for first degree assault, a Class III felony, see Neb. Rev. Stat. § 28-308 (Reissue 1989).

On December 15, 1981, the district court for Buffalo County sentenced Wilcox to 2 years' probation on his conviction for issuing the $287.49 bad check. Subsequently, on March 4, 1982, the district court sentenced Wilcox to 3 years' probation on his conviction of first degree assault. Regarding both convictions and as a term of probation in each case, Wilcox was required to make monetary restitution and was forbidden to leave the jurisdiction. Additionally, as a condition of probation for the conviction on the check charge, Wilcox was ordered to receive outpatient counseling for alcohol abuse and attend meetings of Alcoholics Anonymous.

On December 8, 1983, the State moved for revocation of Wilcox's probation on the bad check conviction and alleged that Wilcox had failed to make restitution, obtain alcohol abuse counseling, and attend Alcoholics Anonymous meetings. The district court, in revocation proceedings on January 25, 1984, concluded that Wilcox had violated probation, but extended Wilcox's probation to March 1, 1985.

On August 3, 1984, the State moved for revocation of Wilcox's probation for both convictions. Concerning the assault conviction, the State alleged that Wilcox, without notifying his probation officer, had twice left the jurisdiction during the term of his probation. The State also alleged that Wilcox violated probation on the bad check conviction by his departure from the court's jurisdiction without notifying his probation officer and by his failure to make restitution. When

Wilcox failed to appear for the revocation hearing, the district court issued a bench warrant for his arrest, and Wilcox was subsequently arrested, in May 1990. At the hearing for revocation of his probation, Wilcox voluntarily waived his right to an evidentiary hearing and admitted the violations of probation alleged in the State's motions. The court accepted Wilcox's admissions of probation violations, revoked the probation imposed for each of Wilcox's convictions, and sentenced Wilcox to imprisonment for 6 months on each conviction, with the sentences to be served concurrently in the Buffalo County Detention Center.

ASSIGNMENTS OF ERROR

Wilcox contends that the district court abused its discretion by not sentencing Wilcox to probation rather than incarceration, and that, in any event, the sentences imposed are excessive. The State counters that the court imposed an invalid sentence on the conviction for first degree assault, because Wilcox's sentence to imprisonment is for a term less than the statutory minimum.

CONVICTION ON CHECK CHARGE

Second-offense issuing a bad check is a Class IV felony, see § 28-611(2), punishable by a maximum of 5 years' imprisonment, a $10,000 fine, or both such imprisonment and fine, see Neb. Rev. Stat. § 28-105(1) (Reissue 1979); hence, a conviction for issuing a bad check carries no statutorily prescribed minimum sentence. The district court sentenced Wilcox to 6 months' imprisonment in the Buffalo County Detention Center.

" 'A sentence imposed within the statutory limits will not be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed.' " *State v. Johnson*, 238 Neb. 206, 208, 469 N.W.2d 761, 763 (1991) (quoting from *State v. Kitt*, 232 Neb. 237, 440 N.W.2d 234 (1989)). Accord, *State v. Witt*, 239 Neb. 400, 476 N.W.2d 556 (1991); *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991). This court has also stated:

> [I]n considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment and

> includes the observations of the sentencing judge as to the demeanor, attitude, and all facts and circumstances surrounding the life of the defendant.

State v. Stranghoener, 208 Neb. 598, 603, 304 N.W.2d 679, 682 (1981). Accord, *State v. Witt, supra*; *State v. Tuttle*, 238 Neb. 827, 472 N.W.2d 712 (1991); *State v. Schall*, 234 Neb. 101, 449 N.W.2d 225 (1989). Further, "[w]hether the sentence imposed is probation or incarceration is a matter within the discretion of the trial court, whose judgment denying probation will be upheld in the absence of an abuse of discretion." *State v. Zitterkopf*, 236 Neb. 743, 749-50, 463 N.W.2d 616, 621 (1990). Accord, *State v. Lane*, 227 Neb. 687, 419 N.W.2d 666 (1988); *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987).

Wilcox's sentence on the bad check conviction is within the range of penalties statutorily prescribed for a Class IV felony. In view of Wilcox's unwillingness to fulfill the conditions of his probation, as demonstrated by the established violations of probation before revocation, we are unable to conclude that the district court abused its discretion in the sentence imposed as the result of Wilcox's conviction for issuing a bad check.

FIRST DEGREE ASSAULT

First degree assault is a Class III felony, § 28-308(2), punishable by imprisonment from 1 to 20 years, a $25,000 fine, or both such imprisonment and fine, § 28-105(1). Thus, the minimum sentence of incarceration for a first degree assault conviction is 1 year. The district court sentenced Wilcox to 6 months' imprisonment in the Buffalo County Detention Center. The State contends that a sentence to a term of imprisonment of 6 months for a Class III felony is unauthorized by § 28-105(1), which clearly prescribes that incarceration, as punishment for conviction of a Class III felony, is for a minimum term of 1 year.

In a direct appeal, when a defendant has appealed to correct errors which may have entered into the defendant's conviction or sentence, the Supreme Court is empowered to set aside a sentence and remand for resentencing, when the sentence imposed is unauthorized under law and, therefore, void. See, *State v. Wren*, 234 Neb. 291, 450 N.W.2d 684 (1990); *State v.*

Ferrell, 218 Neb. 463, 356 N.W.2d 868 (1984); *State v. Rolling*, 209 Neb. 243, 307 N.W.2d 123 (1981); *State v. Gaston*, 191 Neb. 121, 214 N.W.2d 376 (1974). "A void sentence is no sentence . . . and therefore the defendant is legally without sentence." *State v. Wren, supra* at 294, 450 N.W.2d at 687. The preceding rules apply " 'with equal force to a sentence for a shorter period than the minimum prescribed by statute.' " *State v. Gaston, supra* at 123, 214 N.W.2d at 377. Section 28-105(1) authorizes imprisonment for a minimum of 1 year on a conviction for a Class III felony; therefore, the district court lacked statutory authority to sentence Wilcox to a term of imprisonment of less than 1 year.

Additionally, our review in Wilcox's case discloses plain error in the district court's sentence on the first degree assault conviction, since the court sentenced Wilcox to serve his imprisonment in the Buffalo County Detention Center. "Plain error may be found on appeal, when an error, unasserted or uncomplained of at trial, but plainly evident from the record, prejudicially affects a litigant's substantial right and, if uncorrected, would cause a miscarriage of justice or damage the integrity, reputation, and fairness of the judicial process." *In re Estate of Fischer*, 227 Neb. 722, 726, 419 N.W.2d 860, 862 (1988). Accord, *State v. Moore*, 235 Neb. 955, 458 N.W.2d 232 (1990); *State v. Thomas*, 229 Neb. 635, 428 N.W.2d 221 (1988). See, also, Neb. Rev. Stat. § 25-1919 (Supp. 1991): "The . . . Supreme Court may at its option consider a plain error not specified in appellant's brief." See, further, Neb. Ct. R. of Prac. 9D(1)d (rev. 1991): "The court may, at its option, notice a plain error not assigned." In *Katskee v. Nevada Bob's Golf of Neb.*, 238 Neb. 654, 661, 472 N.W.2d 372, 379 (1991), we stated, "Plain error may be asserted for the first time on appeal or be noted by the appellate court on its own motion."

Wilcox was convicted of a Class III felony. Section 28-105(2) provides in pertinent part: "All sentences of imprisonment for Class . . . III felonies . . . shall be served in institutions under the jurisdiction of the Department of Correctional Services." The Buffalo County Detention Center is not an institution under the jurisdiction of the state Department of Correctional Services. Therefore, the district court's sentence on Wilcox's first degree

assault conviction, that is, imprisonment in the Buffalo County Detention Center, is unauthorized. See *State v. Wren, supra.*

Because the district court lacked statutory authority to impose a 6-month sentence in the county detention center for Wilcox's conviction of first degree assault, a Class III felony and a crime punishable by imprisonment for a minimum term of 1 year in an institution "under the jurisdiction of the Department of Correctional Services," see § 28-105(2), we set aside the district court's sentence imposed on Wilcox for his assault conviction.

CONCLUSION

The sentence on Wilcox's conviction for issuing a bad check is affirmed, but the sentence on Wilcox's first degree assault conviction is vacated, and this matter is remanded to the district court so that an authorized and appropriate sentence may be imposed on Wilcox.

AFFIRMED IN PART, AND IN PART SENTENCE VACATED AND CAUSE REMANDED FOR RESENTENCING.

STATE OF NEBRASKA, APPELLEE, V. JEFFREY DALE McNERNY, APPELLANT.

479 N.W.2d 454

Filed January 31, 1992. Nos. 90-1013, 90-1014.

1. **Sentences: Time.** A sentence validly imposed takes effect from the time it is pronounced.
2. **Sentences: Appeal and Error.** In the absence of a timely appeal, even an erroneous sentence cannot be corrected.
3. **Sentences.** The meaning of a sentence is, as a matter of law, determined by the contents of the sentence itself.
4. _____. Unless a court imposing a later independent sentence specifically states otherwise at the time of its pronouncement, the later sentence is to be served consecutively to any earlier imposed sentence or sentences.
5. _____. Unless specifically stated otherwise when pronounced, multiple sentences imposed at the same time run concurrently with each other.
6. **Jurisdiction.** The office of a motion is not to initiate new litigation, but to bring before the court for ruling some material but incidental matter arising in the

progress of the case in which the motion is filed; jurisdiction over a motion is therefore dependent upon the court's having jurisdiction over the case in which the motion is filed.

7. **Jurisdiction: Appeal and Error.** When a trial court lacks jurisdiction to adjudicate the merits of a claim, an appellate court likewise lacks jurisdiction to do so and may only dismiss the purported appeal.

Appeals from the District Court for Red Willow County: JACK H. HENDRIX, Judge. Appeals dismissed.

Maurice A. Green, of Burger, Bennett & Green, P.C., for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

These purported appeals, consolidated in this court for argument and adjudication, arise from the determination of the district court judge that the sentences he imposed upon the defendant-appellant, Jeffrey Dale McNerny, in these two cases were to be served consecutively to the sentences said judge had imposed upon McNerny in two earlier cases. McNerny assigns the foregoing determination as error. We dismiss.

At a consolidated hearing held on March 18, 1987, McNerny was sentenced in one case to imprisonment for a period of not less than 1 nor more than 4 years for burglary and in the second case to like periods of imprisonment for another burglary and for an act of criminal mischief. These three sentences were ordered served concurrently with each other.

While on parole from those sentences, McNerny was sentenced, at a consolidated hearing held on November 13, 1987, in case No. 90-1013 to imprisonment for a period of 6 months because of yet another conviction for criminal mischief and in case No. 90-1014 to imprisonment for periods of not less than 2 nor more than 5 years on each of two additional convictions for burglary. These three sentences also were ordered served concurrently with each other. Nothing was said about the relationship between these sentences and those

imposed on March 18, 1987.

No appeals were taken from any of the foregoing sentences; however, on August 29, 1990, McNerny filed a motion in case No. 90-1013, seeking "an order clarifying the sentences handed down . . . at the November 13, 1987 sentencing hearing. Specifically . . . that the [district court judge] clarify as to whether the November 13, 1987 sentences shall run concurrent with or consecutive to the March 18, 1987 sentences . . . ." McNerny later filed an identical motion in case No. 90-1014.

At the hearing on those motions, McNerny asked the district court judge to "review the comments" he had made on November 13, 1987, and determine whether the sentences he imposed that day were "to run concurrent or to run consecutive to the prior order." The district court judge announced that "the sentence made in each case on November 13, 1987 was and were consecutive to the" sentences imposed on March 18.

We have ruled that a sentence validly imposed takes effect from the time it is pronounced, *State v. Foster, ante* p. 598, 476 N.W.2d 923 (1991), and that in the absence of a timely appeal, even an erroneous sentence cannot be corrected, *State v. Reichstein*, 233 Neb. 715, 447 N.W.2d 635 (1989).

Moreover, what the district court judge may have thought he meant by observing that McNerny might have to face a parole violation charge is of no consequence, for the meaning of a sentence is, as a matter of law, determined by the contents of the sentence itself. See, *Kerndt v. Ronan*, 236 Neb. 26, 458 N.W.2d 466 (1990); *Neujahr v. Neujahr*, 223 Neb. 722, 393 N.W.2d 47 (1986).

Harpster v. Benson, 216 Neb. 776, 777, 345 N.W.2d 335, 336 (1984), states: "When sentence is pronounced upon one already serving a sentence from another court, the second sentence does not begin to run until the sentence which the prisoner is serving has expired, unless the court pronouncing the second sentence specifically states otherwise." Accord, *Nelson v. Wolff*, 190 Neb. 141, 206 N.W.2d 563 (1973); *Brott v. Fenton*, 120 Neb. 792, 235 N.W. 449 (1931); *State, ex rel. Allen, v. Ryder*, 119 Neb. 704, 230 N.W. 586 (1930). It is true that, here, all the sentences were imposed by the same court; however, the focus of *Harpster*, *Allen*, *Brott*, and *Nelson* is on the fact that the

sentences in question were independent from each other in the sense that they were imposed at different times. Thus, the applicable rule is that unless the court imposing a later independent sentence specifically states otherwise at the time of its pronouncement, the later sentence is to be served consecutively to any earlier imposed sentence or sentences. The rule is otherwise where multiple sentences are imposed at the same time. In such event, unless the court specifically states otherwise at the time the sentences are pronounced, they run concurrently with each other. See, *Stewart v. Delgado*, 231 Neb. 401, 436 N.W.2d 512 (1989); *Culpen v. Hann*, 158 Neb. 390, 63 N.W.2d 157 (1954).

It is important to recognize, however, that trial finality with respect to the sentences at issue took place when the sentences were imposed. See *State v. Kramer*, 231 Neb. 437, 436 N.W.2d 524 (1989) (for purposes of appeal, trial finality achieved when sentence imposed). See, also, *State v. Foster, supra*; *In re Interest of Wolkow*, 206 Neb. 512, 293 N.W.2d 851 (1980). The district court thus lacked jurisdiction to entertain a motion to modify the sentences, for the office of a motion is not to initiate new litigation, but to bring before the court for ruling some material but incidental matter arising in the progress of the case in which the motion is filed. Jurisdiction over a motion is therefore dependent upon the court's having jurisdiction over the case in which the motion is filed. See, *North Shore Hospital v. McConico*, 39 Misc. 2d 1032, 242 N.Y.S.2d 402 (1963); *Morrison v. Patterson*, 221 Iowa 883, 267 N.W. 704 (1936); *Caperton v. Winston Co. Fair Ass'n*, 169 Miss. 503, 153 So. 801 (1934).

When a trial court lacks jurisdiction to adjudicate the merits of a claim, this court likewise lacks jurisdiction to do so. *Nebraska State Bar Found. v. Lancaster Cty. Bd. of Equal.*, 237 Neb. 1, 465 N.W.2d 111 (1991). Under such circumstances, we only have jurisdiction to dismiss the purported appeal. *Booker v. Nebraska State Patrol*, *ante* p. 687, 477 N.W.2d 805 (1991).

Accordingly, these purported appeals are dismissed.

APPEALS DISMISSED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL DOUGLASS, APPELLANT.

479 N.W.2d 457

Filed January 31, 1992. No. 90-1044.

1. **Criminal Law: Courts: Appeal and Error.** Upon appeal from county court in a criminal case, the district court acts as an intermediate appellate court, rather than as a trial court. Its review is limited to an examination of the county court record for error or abuse of discretion.
2. **Criminal Law: Appeal and Error.** Factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong.
3. **Convictions: Appeal and Error.** An appellate court will not interfere with a conviction based on evidence unless the evidence is so lacking in probative force that as a matter of law it can be said that it is insufficient to support a verdict of guilty beyond a reasonable doubt.
4. **Criminal Law: Motor Vehicles.** Any person who drives any motor vehicle in such a manner as to indicate a willful disregard for the safety of persons or property is guilty of willful reckless driving.
5. **Words and Phrases.** Willful means intentional.
6. _____. Recklessness is the disregard for or indifference to the safety of another or for the consequences of one's act.
7. **Criminal Law: Motor Vehicles.** Willful reckless driving is characterized by a deliberate disregard for the safety of others or their property.
8. _____: _____. For there to be willful reckless driving, it is not necessary that there be property damage or injury inflicted.

Appeal from the District Court for Hall County, JOSEPH D. MARTIN, Judge, on appeal thereto from the County Court for Hall County, RICHARD E. WEAVER, Judge. Judgment of District Court reversed, and cause dismissed.

O. William VonSeggern for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Following a bench trial in county court, defendant was convicted of willful reckless driving, a violation of Neb. Rev. Stat. § 39-669.03 (Reissue 1988). This conviction was affirmed following an appeal to the district court. Defendant appeals

here, claiming the conviction was contrary to the law and the facts, since the State failed to prove that the defendant demonstrated a willful disregard for the safety of persons or property. We reverse and dismiss.

Police officer Tim Meguire, on April 20, 1990, at approximately 1:15 a.m., observed a red Jeep being driven by the defendant westbound on Faidley Avenue in the city of Grand Island. The officer clocked the vehicle on his radar unit as it passed him and noticed that the reading on the radar was 44 miles per hour. However, the officer was unable to get the Jeep's speed locked in until the Jeep had slowed to 36 miles per hour. This was in a 25-mile-per-hour zone. While the officer attempted to catch up to the vehicle, he noticed it drive into the parking lane, occasionally very closely approaching the curb, and then drift back into the driving lane. There was no evidence of any automobiles' being parked in this area or of the presence of any other traffic.

After having stopped the defendant, the officer noticed an odor about the defendant, but testimony as to the nature of the odor was not received into evidence.

Defendant pleaded guilty to a charge of speeding and was found guilty of willful reckless driving after pleading not guilty.

" '[U]pon appeal from county court in a criminal case, the district court acts as an intermediate appellate court, rather than as a trial court. . . . [Its] review is limited to an examination of the county court record for error or abuse of discretion.' " *State v. Boham*, 233 Neb. 679, 683, 447 N.W.2d 485, 488 (1989).

Factual findings of a judge who serves as the trier of fact in a criminal case will not be disturbed on appeal unless clearly wrong. *State v. Lowry, ante* p. 343, 476 N.W.2d 540 (1991).

Neither this court nor the district court when acting as an appellate court will interfere with a conviction based on evidence unless the evidence is so lacking in probative force that as a matter of law it can be said that it is insufficient to support a verdict of guilty beyond a reasonable doubt. See *State v. Cook*, 212 Neb. 718, 325 N.W.2d 159 (1982).

"Any person who drives any motor vehicle in such a manner as to indicate a willful disregard for the safety of persons or

property is guilty of willful reckless driving." § 39-669.03. Willful means intentional. *State v. Boham, supra.* Recklessness is the disregard for or indifference to the safety of another or for the consequences of one's act. *State v. Green*, 238 Neb. 475, 471 N.W.2d 402 (1991). Willful reckless driving is characterized by a deliberate disregard for the safety of others or their property. *State v. Green*, 182 Neb. 615, 156 N.W.2d 724 (1968). For there to be willful reckless driving, it is not necessary that there be property damage or injury inflicted. *State v. Boham, supra.*

The question for this court to answer is whether the evidence adduced was so lacking in probative force that as a matter of law it can be said that it is insufficient to support a judgment of guilty beyond a reasonable doubt. *State v. Cook, supra.*

This court has addressed the sufficiency of evidence necessary for a conviction of willful reckless driving in at least four cases.

In *State v. Boham, supra*, defendant's motor vehicle maneuvers forced another driver first to brake his vehicle and then to be temporarily pushed onto the dirt outside the traveled portion of the highway. In addition, the defendant also prevented the other driver from passing a truck. This court held that there was sufficient evidence to support a conclusion beyond a reasonable doubt that the defendant's actions indicated an intentional disregard for the safety of the other driver.

In *State v. Cook, supra*, the defendant, who was in the process of obtaining a dissolution of her marriage, drove her automobile across the road and struck her husband's vehicle coming from the opposite direction. Immediately after the impact she told her estranged spouse that she would run into him " 'again and again.' " *Id.* at 719, 325 N.W.2d at 160. This court held the evidence was not insufficient to support a verdict of guilty beyond a reasonable doubt of willful reckless driving.

Although this court stated in *State v. DiLorenzo*, 181 Neb. 59, 146 N.W.2d 791 (1966), that speed alone does not amount to recklessness in the operation of an automobile, it did hold there was sufficient evidence to sustain a conviction of willful reckless driving where the defendant drove at speeds of 95 to

100 miles per hour on a heavily traveled public highway. The court stated that the test is "whether the particular speed is dangerous under the surroundings and attendant circumstances of the particular case." *Id.* at 63, 146 N.W.2d at 794.

Finally, in *State v. Eberhardt*, 179 Neb. 843, 140 N.W.2d 802 (1966), a police officer activated his red lights and started in pursuit of a defendant who had been observed driving without taillights. The pursuit took place mainly on gravel roads with houses and farms on both sides and at speeds of 85 to 90 miles per hour. During the chase, the defendant ran six stop signs. This court held that the evidence was sufficient to sustain a conviction of willful reckless driving.

The element that the previously cited cases have in common and that is lacking in this case is the *intentional* or *deliberate* disregard for the safety or property of others. There was no evidence of the presence of any persons or property subjected to any danger in the area. Furthermore, the defendant was driving but 36 miles per hour, compared to speeds of from 85 to 100 miles per hour in *DiLorenzo* and *Eberhardt*.

Boham and *Cook* are perfect examples of intentional disregard for the safety of others or their property; in one instance the defendant purposely tried to endanger another driver by attempting to cut him off several times, and in the other instance the defendant deliberately endangered her husband by running into his car.

The evidence in this case was insufficient as a matter of law to prove willful reckless driving by the defendant, and the findings by the lower courts to the contrary were clearly wrong. The judgment of the district court is reversed, and the cause is ordered dismissed.

REVERSED AND DISMISSED.

GRANT, J., participating on briefs.

RAUL CASTRO, APPELLANT AND CROSS-APPELLEE, V. GILLETTE GROUP, INC., DOING BUSINESS AS PACKERLAND, AND CIGNA PROPERTY AND CASUALTY CO., APPELLEES AND CROSS-APPELLANTS.

479 N.W.2d 460

Filed January 31, 1992. No. 91-223.

1. **Workers' Compensation: Appeal and Error.** Findings of fact by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party.
3. **Workers' Compensation: Expert Witnesses.** A medical expert's opinion is not sufficient as a matter of law to support a workers' compensation claim unless it is based on a reasonable degree of medical certainty or a reasonable probability.
4. **Workers' Compensation: Expert Witnesses: Proof.** When a physician's testimony gives rise to conflicting inferences of an *equal* degree of probability, so that the choice between them is a mere matter of conjecture, a compensation award cannot be sustained. Where, however, the inferences are not equally consistent and the more probable conclusion is that for which the claimant contends, then the claimant sustains his burden of proof on the element involved.
5. **Workers' Compensation: Appeal and Error.** The issue of causation of an injury or disability is one for determination by the trier of fact, whose findings will not be set aside unless clearly wrong.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Robert M. Brenner, of Robert M. Brenner Law Office, for appellant.

Melvin C. Hansen and Matthew J. Buckley, of Hansen, Engles & Locher, P.C., for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

Raul Castro appeals a Workers' Compensation Court rehearing decision in which the court found that the appellant had been permanently and partially disabled as a result of an

injury during the course of his employment with appellee Gillette Group, Inc., doing business as Packerland. The court further found that claimant was entitled to future medical services, but had not sufficiently established that pain therapy was reasonably necessary treatment.

On November 28, 1988, while employed by Packerland meatpacking plant as a chuck operator, appellant suffered injuries to his left shoulder when a portion of a bull carcass swung away from him while the hook which appellant was holding in his left hand was still embedded in the carcass.

Appellees cross-appeal, contending that appellant actually injured his shoulder off the job on November 16 when he fell on the ice at home, scraping his nose and injuring his left anterior chest. Appellant's doctor wrote a note to Packerland stating that appellant should not return to work until November 28. Appellant did return to work on that date and was injured in the above-mentioned incident.

Castro assigns as error the following determinations of the Workers' Compensation Court: (1) the denial of appellant's pain clinic treatment and/or rehabilitation as a medical expense; (2) the determination that appellant had reached maximum medical improvement as of March 7, 1990; (3) the termination of appellant's temporary total disability, effective March 7, 1990; and (4) the determination of the extent of appellant's permanent disability. The appellees, Gillette and CIGNA Property and Casualty Co., cross-appeal, assigning as error the Workers' Compensation Court's determination that the appellant's injury arose out of and in the course of his employment.

Findings of fact by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong. *Cline v. County Seat Lounge, ante* p. 42, 473 N.W.2d 404 (1991). In testing the sufficiency of the evidence to support findings of fact made by the court after rehearing, the evidence must be considered in the light most favorable to the successful party. *Id.*

Regarding the first assignment of error, which questions the court's denial of pain clinic treatment as a medical expense,

appellant has failed to establish that the Workers' Compensation Court was clearly wrong. The assigned error is without merit.

Under the Nebraska Workers' Compensation Act, Neb. Rev. Stat. § 48-120 (Reissue 1988) provides that an employer shall be liable for all reasonable medical services, as and when needed, which are required by the nature of the injury and which will relieve pain and hasten the employee's restoration to health and employment.

The evidence on rehearing showed that Dr. Wendell Ropp, when asked in his first deposition whether a pain clinic could improve appellant's condition, responded, "I would hope that it would." In his second deposition, Dr. Ropp testified, "Well, it's my opinion that he has a chronic pain condition that *might* be improved through a pain clinic" (emphasis supplied), and later commented, "[W]e should exhaust every possibility for minimizing that complaint before assessing a permanent impairment because of pain."

A medical expert's opinion is not sufficient as a matter of law to support a workers' compensation claim unless it is based on a reasonable degree of medical certainty or a reasonable probability. See *Miner v. Robertson Home Furnishing, ante* p. 525, 476 N.W.2d 854 (1991).

In *Welke v. City of Ainsworth*, 179 Neb. 496, 138 N.W.2d 808 (1965), this court set the standard for determining whether an expert's opinion is sufficient to support a workers' compensation claim. We held that when a physician's testimony

> gives rise to conflicting inferences of *equal* degree of probability so that the choice between them is a mere matter of conjecture, a compensation award cannot be sustained. Where, however, the inferences are not equally consistent and the more probable conclusion is that for which the claimant contends, then the claimant sustains his burden of proof on the element involved.

(Emphasis supplied.) *Id.* at 504-05, 138 N.W.2d at 813.

Because Dr. Ropp's testimony regarding the necessity of the pain clinic was couched in terms of possibility and hopefulness, rather than probability to a reasonable degree of medical certainty, the Workers' Compensation Court's denial of that

service was not erroneous.

As to the second, third, and fourth assignments of error, we respectively affirm. Assignments Nos. 2 and 3 essentially complain of the same determination. Substantial evidence existed to support the determination. Dr. Ropp testified that appellant's condition seemed "static and chronic at this point."

As to appellant's permanent disability, Dr. Ropp was of the opinion that appellant had shown few objective signs of residual injury, with the exception of the persisting pain that limits the use and range of movement in his left arm. Dr. Ropp had perceived no improvement in the condition of his patient over the course of a full year and considered his patient's pain to be chronic and static. Finally, Dr. Ropp had estimated appellant's permanent disability at 40 to 50 percent of the function of his upper extremity. Appellant's impairment has occurred to a scheduled member, which is an injury compensated on the basis of loss of physical function. The Workers' Compensation Court accordingly awarded the appellant a 50-percent permanent partial impairment to his left arm. The record does not support appellant's contention that he suffers from a whole-body injury.

For the aforementioned reasons, the Workers' Compensation Court deemed appellant's condition to be permanent. The assignment is not meritorious.

In view of today's holding, we must also deny appellant's request for attorney fees. Appellant may not recover attorney fees, as he did not succeed in obtaining an increase in his award, as required by Neb. Rev. Stat. § 48-125 (Supp. 1991).

As to appellees' cross-appeal of the court's determination that appellant's injury arose out of and in the course of his employment, we affirm.

A basic tenet of workers' compensation law is that the issue of causation of an injury or disability is one for determination by the trier of fact, whose findings will not be set aside unless clearly wrong. *Way v. Hendricks Sodding & Landscaping, Inc.*, 236 Neb. 519, 462 N.W.2d 99 (1990).

We have held in previous workers' compensation decisions that where the inferences are not equally consistent and the more probable conclusion is that for which the claimant

contends, then the claimant sustains his burden of proof on the element involved. See *Halbert v. Champion International*, 215 Neb. 200, 337 N.W.2d 764 (1983).

If a claimant has adduced competent evidence having probative value which preponderantly convinces the trier or triers of fact that the claimant had an accident and incurred a disability arising out of and in the course of his employment, notwithstanding that the trier or triers of fact may recognize a possibility or even a probability that this was not true, an award of compensation thereon is proper and on appeal must be sustained. *Welke v. City of Ainsworth, supra.*

While the evidence indeed suggested a possibility that Castro's shoulder injury initially arose from his fall on the ice at home on November 16, ample evidence existed through the deposed physicians to support the panel's determination that he was injured at work on November 28, and we cannot hold that the Workers' Compensation Court was clearly wrong.

AFFIRMED.

PAMELA S. EDMONDS, APPELLANT, V. IBP, INC., APPELLEE.

479 N.W.2d 754

Filed January 31, 1992. No. 91-334.

1. **Workers' Compensation: Proof.** In a workers' compensation case, the plaintiff must establish by a preponderance of the evidence that the injury for which an award is sought arose out of and in the course of employment.
2. _____: _____. An award from the Workers' Compensation Court cannot be based on mere speculation or possibility.
3. **Workers' Compensation: Evidence: Expert Witnesses.** Expert medical testimony must be based on a reasonable degree of medical certainty or a reasonable probability.
4. _____: _____: _____. While expert medical testimony need not be couched in the magic words "reasonable degree of medical certainty or reasonable probability," such testimony couched in terms of possibility is not sufficient.
5. _____: _____: _____. Expert medical testimony based on "could," "may," or "possibly" lacks the definiteness required to support an award from the Workers' Compensation Court.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Phillip G. Wright, of Quinn & Wright, for appellant.

Marie L. Welsh for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

The plaintiff-appellant employee, Pamela S. Edmonds, challenges the adequacy of the award of benefits for 6 percent permanent partial disability of each hand from the defendant-appellee employer, IBP, inc. More specifically, Edmonds claims the Workers' Compensation Court erred in failing to (1) consider certain evidence, (2) find that her thoracic outlet syndrome was proximately caused by her employment, and (3) find that she suffered a body-as-a-whole impairment which reduced her earning capacity. We affirm.

Edmonds, now approximately 30 years of age, had been working at IBP for nearly 2 1/2 years trimming the fat and tendons from various cuts of meat as they came by her on a conveyor belt. After trimming the cuts, which then weighed between 7 and 20 pounds, she threw them onto another belt. She generally worked 8-hour shifts, but on occasion would work 16 hours.

She had no disabilities related to her employment until September 19, 1988, when, she testified, "My arm would go dead and no feeling at all, and my hands tingled and would go numb and my wrists had pain in them." The compensation court's pretrial order of March 13, 1990, recites the parties agreed that "as a result of an accident arising out of and in the course of her employment by" IBP, Edmonds developed bilateral carpal tunnel syndrome, which required tunnel release surgery on her right and left wrists.

It is Edmonds' assertion that in addition to the stipulated injuries, she also suffers from thoracic outlet syndrome. The record describes the syndrome, or condition, as occurring when nerves get pinched at the space between several muscles at a point between the first rib and the clavicle. The condition develops when the "space gets narrowed, and there's less room for the nerves and the vascular structures to sit comfortably in

that space," causing pain, numbness, or tingling.

Edmonds testified that the physician who performed the tunnel release surgery referred her to Dr. Keith McLarnan, who diagnosed the thoracic outlet syndrome. McLarnan testified that in addition to bodybuilding, peculiarities in the structure of the neck, and bony prominences on the cervical vertebrae, repetitive motion "would possibly aggravate" the condition.

When asked whether, based on a reasonable degree of medical certainty, the condition was caused by Edmonds' work, McLarnan stated that "her employement [sic] may have been a factor in the development of her thoracic outlet syndrome." However, McLarnan also revealed that he did not know what Edmonds' employment entailed, saying:

> It's pretty vague, from my history. That she was working in a packing plant; and I think, frankly, that's about all the more precise information I have about what she did.
>
> Q. Okay. Do you know what she did for the packing plant?
>
> A. I didn't specify precisely in the history what she did.

On April 13, 1990, Edmonds moved to amend the pretrial order to include Dr. Paul Collicott as an expert witness and "all medical records, reports . . . which . . . Collicott may have regarding" her. On April 19, 1990, Edmonds further moved for an order to take Collicott's deposition, since he would be unavailable for the scheduled trial. IBP objected to the first motion, arguing that a report in which Collicott indicates that Edmonds has thoracic outlet syndrome was not timely filed. According to the transcript, Edmonds had in fact violated rule XX of the Nebraska Workers' Compensation Court's Rules of Procedure (1989), which requires all medical reports to be served on the opposing party, "in all events, within 30 days following the date the pretrial order is received and filed if the party intends to offer the report as evidence." She does not claim otherwise.

On April 30, 1990, the compensation court entered two separate orders. In the first, the court ruled that Collicott could be deposed and the deposition submitted to the court subsequently to the scheduled trial. In the second, the court amended its pretrial order so as to permit Edmonds to include

Collicott as an expert witness "and any and all medical records, reports, medical narrative, prognosis, diagnosis, and bills which . . . Collicott may have regarding . . . Edmonds."

At the May 3, 1990, trial, IBP again objected to the admission of the disputed medical report, arguing once more that it had not received the report within the required 30 days. The compensation court ruled:

> THE COURT: . . . And with regard to [the report], you are taking . . . Collicott's deposition, is that correct?
>
> [Edmonds' counsel]: Yes, Your Honor, that is scheduled.
>
> THE COURT: And you have received previous permission to do that by Judge Cavel, isn't that correct?
>
> [Edmonds' counsel]: Yes, Your Honor.
>
> THE COURT: All right, so do you have a date for that?
>
> [Edmonds' counsel]: May 23rd, isn't that correct?
>
> [IBP's counsel]: That's right, and I've cleared that with my calendar and that's satisfactory.
>
> THE COURT: All right. In that event, the objection to [the report] will be sustained . . . .

At Collicott's deposition, Edmonds nonetheless caused the medical report to be marked as an exhibit and offered it as evidence. IBP objected, pointing out that the court had ruled the report inadmissible. Edmonds argued that the only reason the court sustained the trial objection to the report was that Collicott was going to be deposed. Whatever the import of that argument, the report is found as an exhibit at the end of Collicott's deposition; the record contains no ruling on IBP's deposition objection to the report.

During the deposition, Edmonds had Collicott confirm that in the disputed report, he had written that she would have "70 percent partial or complete relief of her symptoms" if she had surgery. When asked whether, within reasonable medical certainty, "the repetitive action which you've described and the work history" were connected, Collicott responded affirmatively, saying that if what Edmonds told him was true, the "type of work that she did may have well precipitated this syndrome." In that regard, the report states that from a historical standpoint, "it appears that the thoracic outlet

syndrome appears to be related to the repetitive-type of work that [Edmonds] was doing at [IBP]."

Dr. Edward Schima, a neurologist, testified that although Edmonds had musculoskeletal pain in her left arm and it was possible she had thoracic outlet syndrome, he did not "see it's any more possible she should have it than any of us . . . ." Schima further testified that his examination revealed nothing abnormal and that in his opinion there was nothing to indicate that Edmonds suffered from the condition.

The compensation court concluded Edmonds had "failed to prove preponderantly that she sustained a thoracic outlet syndrome as a result of her accident and injury of September 19, 1988."

Edmonds first alleges that the compensation court erred in failing to consider the disputed Collicott medical report.

In support of her argument, Edmonds refers to *Miner v. Robertson Home Furnishing*, 236 Neb. 514, 462 N.W.2d 96 (1990), *appeal after remand* 239 Neb. 525, 476 N.W.2d 854 (1991). Therein, the plaintiff attempted to admit a note as part of an exhibit at his deposition, which was taken after the oral portion of the trial. The defendants objected to the exhibit. The compensation court admitted the deposition into evidence, without indicating whether it considered the objection or used the note, and dismissed the case. This court wrote at 236 Neb. at 517, 462 N.W.2d at 98:

> We are not faced with a question of accepting the factual findings of the Workers' Compensation Court, but with insufficient information to determine whether the court adequately made factual findings on this issue. We must remand with directions to the court to rule on the receipt of this evidence.

The controlling difference between *Miner, supra*, and the case now before us is that here, the compensation court ruled on the objection to the medical report and excluded it. *Miner* thus has no application to the matter at hand.

Although consistency in evidential rulings is "a consummation Devoutly to be wish'd," the pretrial order concerning the disputed Collicott report, whatever it may have meant, was superseded by the trial ruling, which, in the proper

exercise of the compensation court's discretion, upheld its rule of practice. Indeed, Edmonds does not argue that the trial ruling was incorrect; she merely attempts to circumvent it. This she may not do.

Moreover, the disputed report adds nothing to Collicott's deposition testimony; to write that Edmonds' thoracic outlet syndrome appears to be work related is no different from saying that the work may have precipitated the condition.

Edmonds next complains that the compensation court erred in failing to find that her thoracic outlet syndrome was caused by her employment.

In a workers' compensation case, the plaintiff must establish by a preponderance of the evidence that the injury for which an award is sought arose out of and in the course of employment. See, *Way v. Hendricks Sodding & Landscaping, Inc.*, 236 Neb. 519, 462 N.W.2d 99 (1990); *Badgett v. St. Joseph Hosp.*, 222 Neb. 467, 384 N.W.2d 302 (1986). Hence, Edmonds' evidentiary obligation was to present medical testimony which was sufficiently definite and certain to permit drawing a conclusion that there was a causal connection between the accident and the disability. See, *Gilbert v. Sioux City Foundry*, 228 Neb. 379, 422 N.W.2d 367 (1988); *Powell v. W. G. Pauley Lumber Co.*, 217 Neb. 707, 350 N.W.2d 556 (1984).

McLarnan diagnosed the existence of the thoracic outlet syndrome but could only conclude that Edmonds' employment "may" have been a factor. Moreover, he could not even state what Edmonds actually did at IBP. Collicott similarly did not conclude that Edmonds' work was the cause of her thoracic outlet syndrome but, rather, that it "may have well precipitated" the condition.

As defined in The American Heritage Dictionary 774 (2d coll. ed. 1985), "may" is "[u]sed to indicate a certain measure of likelihood or possibility." However, an award cannot be based on mere speculation or possibility. See, *Castro v. Gillette Group, Inc.*, *ante* p. 895, 479 N.W.2d 460 (1992); *Gray v. Fuel Economy Contracting Co.*, 236 Neb. 937, 464 N.W.2d 366 (1991).

Hohnstein v. W.C. Frank, 237 Neb. 974, 982, 468 N.W.2d 597, 603 (1991), declares that " 'expert medical testimony must

be based on a reasonable degree of medical certainty or a reasonable probability . . . .' " "Probably" has been defined by this court as "reasonably," "credibly," "presumably," "in all probability," and "very likely." *Hare v. Watts Trucking Service*, 220 Neb. 403, 370 N.W.2d 143 (1985), citing *Welke v. City of Ainsworth*, 179 Neb. 496, 138 N.W.2d 808 (1965). Notwithstanding, the medical expert's testimony need not be couched in the magic words "reasonable degree of medical certainty or reasonable probability," *Hohnstein, supra* at 982, 468 N.W.2d at 603, but "medical testimony couched in terms of 'possibility' is not sufficient," *Lane v. State Farm Mut. Automobile Ins. Co.*, 209 Neb. 396, 411, 308 N.W.2d 503, 512 (1981). The *Hohnstein* court found the medical expert's conclusion adequate, based on his medical opinion to a reasonable degree that the plaintiff " 'has had these problems after the fall and one would assume they were causally related.' " *Hohnstein, supra* at 983, 468 N.W.2d at 604.

In *Fuglsang v. Blue Cross*, 235 Neb. 552, 554, 456 N.W.2d 281, 283 (1990), we held the court correctly excluded a medical opinion that " 'on a 50/50 basis' " it was " 'more likely than not' " that a particular condition predated the issuance of the policy under which coverage was sought. In so doing, we relied on *Husted v. Peter Kiewit & Sons Constr. Co.*, 210 Neb. 109, 114, 313 N.W.2d 248, 251 (1981), holding that a medical opinion amounting to nothing more "than a statement that it was 'more likely' the injury occurred" at a given time lacked "the definiteness and certainty necessary for it to be the basis for a compensation award."

In *Hatting v. Farmers Co-op Assn.*, 212 Neb. 242, 246, 322 N.W.2d 423, 425 (1982), a physician's statement that the plaintiff's injury "could have" been related to his employment and that it was "medically 'possible' " the injury could cause the disability was inadequate to establish the required causal connection. "That an injury could have possibly been caused by an employment accident is not sufficient to meet the burden imposed upon an employee in order to recover under our Workmen's Compensation Act." *Id.*

In short, expert medical testimony based on "could," "may," or "possibly" lacks the definiteness required to support

an award. "If an inference favorable to the claimant can only be reached upon the basis of possibility or speculation, he cannot recover. . . . An award cannot be based upon conflicting inferences of equal degrees of probability." *Husted, supra* at 113-14, 313 N.W.2d at 251. See, also, *Castro v. Gillette Group, Inc., supra.*

In the instant case, Schima concluded that Edmonds did not suffer from thoracic outlet syndrome, and although McLarnan and Collicott found the syndrome to exist, they were unable to give a medical opinion based on reasonable certainty that it was related to Edmonds' work. Thus, Edmonds has, as a matter of law, failed to prove a causal connection between her disability and her employment. See *Catlin v. Prairie Marketing, ante* p. 363, 476 N.W.2d 234 (1991).

In the final assignment of error, Edmonds contends that the compensation court erred in failing to find she suffers an impairment to her body as a whole which has reduced her earning capacity by at least 30 percent.

Neb. Rev. Stat. § 48-121(3) (Reissue 1988) provides that in the event of the loss or loss of use of more than one specific member of the body, such as the hands, which does not amount to total and permanent disability,

> compensation benefits shall be paid for the loss or loss of use of each such member or part thereof, with the periods of benefits to run consecutively. The total loss or permanent total loss of use of both hands . . . in one accident, shall constitute total and permanent disability and be compensated for according to the provisions of subdivision (1) of this section. In all other cases involving a loss or loss of use of both hands . . . total and permanent disability shall be determined in accordance with the facts.

In cases where the injury is to the body as a whole, compensation is determined under subsections (1) and (2) of the statute "by the employee's diminution of employability or impairment of earning power or earning capacity, and is not necessarily determined by a physician's evaluation and assessment of the employee's loss of bodily function." *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 470, 461 N.W.2d 565, 573 (1990).

Edmonds does not quarrel with the compensation court's determination with respect to the disability of her hands, but challenges its finding that she does not suffer a body-as-a-whole impairment because of her thoracic outlet syndrome. Consideration of this claim is foreclosed by our determination that if the thoracic outlet syndrome exists, Edmonds failed as a matter of law to prove it was proximately caused or aggravated by her employment.

It is certainly true the compensation court's award would have been clearer if the court had expressly stated as a finding of fact either that Edmonds did not have the thoracic outlet syndrome or that although she suffered from the condition, it was not proximately caused or aggravated by her employment. The compensation court's mixed conclusion of law and fact that Edmonds "failed to prove preponderantly" that her condition is the result of the subject accident is not particularly illuminating. Nonetheless, the record fails to sustain any of Edmonds' assignments of error.

AFFIRMED.

ELIZABETH LEITZ, ADMINISTRATOR OF THE ESTATE OF KENNETH E. LEITZ, DECEASED, ET AL., APPELLANTS, V. ROBERTS DAIRY AND UNDERWRITERS ADJUSTMENT COMPANY, APPELLEES.

479 N.W.2d 464

Filed January 31, 1992. No. 91-605.

1. **Workers' Compensation: Penalties and Forfeitures: Time: Appeal and Error.** Where a reasonable controversy exists between an employer and an employee as to the payment of workers' compensation, the employer is not liable for the penalty provided in Neb. Rev. Stat. § 48-125 (Reissue 1988) during the time the case is pending in the courts for final determination.
2. **Workers' Compensation.** Whether a reasonable controversy exists is a question of fact.
3. **Workers' Compensation: Appeal and Error.** Findings of fact made by the compensation court after rehearing have the same force and effect as a jury verdict in a civil case, and such determinations by the compensation court will not be set aside on appeal unless they are clearly erroneous.

4. **Workers' Compensation: Penalties and Forfeitures: Attorney Fees: Time.** A reasonable controversy exists between an employer and an employee if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or part. To avoid the payments assessable under Neb. Rev. Stat. § 48-125 (Reissue 1988), an employer need not prevail in opposition to an employee's claim for compensation, but must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation.
5. **Supreme Court: Final Orders.** An opinion of this court is not a final determination of the matter until a mandate has been issued by the court.
6. **Workers' Compensation: Supreme Court: Final Orders: Jurisdiction.** A mandate from this court is required to reinvest the compensation court with jurisdiction.
7. **Workers' Compensation.** An award of the compensation court cannot be enforced until it has become conclusive upon the parties at interest.
8. **Workers' Compensation: Penalties and Forfeitures: Final Orders: Time.** The penalty for waiting time under Neb. Rev. Stat. § 48-125 (Reissue 1988) applies to final adjudicated awards.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

John Kocourek, of Peterson and Kocourek Law Offices, and David R. Stickman for appellants.

Melvin C. Hansen and Matthew J. Buckley, of Hansen, Engles & Locher, P.C., for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The plaintiffs, Elizabeth Leitz and her dependent children, have appealed from the order of the Workers' Compensation Court finding that they were entitled to $1,927.05 as a penalty for the delay in payment of an award to them and entitled to an attorney fee of $500 plus interest as provided by law.

Elizabeth Leitz is the widow and administrator of the estate of Kenneth E. Leitz, who died as a result of a heart attack arising out of and in the course of his employment on April 20, 1988.

In *Leitz v. Roberts Dairy*, 237 Neb. 235, 465 N.W.2d 601 (1991), this court affirmed an award of workers' compensation

benefits to the plaintiffs. The opinion affirming the award was filed in this court on February 15, 1991. The mandate was issued on February 25, 1991. Apparently, the mandate was "entered" in the compensation court also on February 25, 1991. The controversy is when the 30-day waiting-time period commenced to run.

On March 22, 1991, the plaintiffs filed an application in the compensation court alleging that a 50-percent penalty should be added to all amounts due under the award. On May 20, 1991, the compensation court found that the 30-day period commenced to run at the time the mandate of this court was filed in the compensation court and that the payments made between March 29 and April 1, 1991, were delinquent. The plaintiffs have appealed from that order.

Where a reasonable controversy exists between an employer and an employee as to the payment of workers' compensation, the employer is not liable for the penalty provided in Neb. Rev. Stat. § 48-125 (Reissue 1988) during the time the case is pending in the courts for final determination. See, *Steward v. Deuel County*, 137 Neb. 516, 289 N.W. 877 (1940); *Abel Construction Co. v. Goodman*, 105 Neb. 700, 181 N.W. 713 (1921). Because a reasonable controversy existed between the plaintiffs and the defendants in this case, the plaintiffs were not entitled to a penalty payment during the pendency of the appeal to this court.

Whether a reasonable controversy exists is a question of fact. *Harpham v. General Cas. Co.*, 232 Neb. 568, 441 N.W.2d 600 (1989). Findings of fact made by the compensation court after rehearing have the same force and effect as a jury verdict in a civil case, and such determinations by the compensation court will not be set aside on appeal unless they are clearly erroneous. See *Tarvin v. Mutual of Omaha Ins. Co.*, 238 Neb. 851, 472 N.W.2d 727 (1991).

A reasonable controversy exists between an employer and an employee

> if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which

> conclusions affect allowance or rejection of an employee's claim, in whole or part. To avoid the payments assessable under § 48-125, an employer need not prevail in opposition to an employee's claim for compensation, but must have an actual basis, in law or fact, for disputing the employee's claim and refraining from payment of compensation.

Mendoza v. Omaha Meat Processors, 225 Neb. 771, 784-85, 408 N.W.2d 280, 288 (1987).

In the present case, the compensation court was correct in finding there was a reasonable controversy between the parties. The defendants disputed the claim and refrained from payment of compensation in the original case because of questions regarding causation of Leitz' heart attack. The evidence in this case supported reasonable but opposite conclusions as to whether Leitz' heart attack was caused by his employment or by his general health.

The plaintiffs argue that no reasonable controversy existed between the parties after the opinion of this court was filed on February 15, 1991. The opinion is not a final determination of the matter until a mandate has been issued by the court.

A mandate from this court is required to reinvest the compensation court with jurisdiction. Under Neb. Rev. Stat. § 48-188 (Reissue 1988) an award of the compensation court cannot be enforced until it has become "conclusive upon the parties at interest." The award in this case was not final and the penalty did not commence until 30 days after the mandate of this court had been filed in the compensation court.

The defendants suggest that § 48-125 does not apply to final adjudicated awards. We believe it does. See *McCrary v. Wolff*, 109 Neb. 796, 803, 192 N.W. 237, 240 (1923), where this court stated, "This provision for penalty was placed in the statute evidently with the object . . . to induce prompt payments after the award has been finally established . . . ."

This issue was recently addressed in *Amorosa v. Jersey City Welding & Mach. Works*, 214 N.J. Super. 130, 518 A.2d 529 (1986). That court found that the New Jersey statute authorizing imposition of a penalty for unreasonable or negligent delay of payment in compensation cases applies not

only to interim payments of compensation, but also to fully litigated cases.

In reaching its conclusion, the court stated:

> Because of the delay which results when a case is contested, the disabled worker's need for the prompt payment of temporary disability benefits is especially urgent after a final adjudicated award. In such instances, the employee has had to do without a weekly stipend for a longer period than when an employer does not contest the worker's right to such benefits after notice is given pursuant to *N.J.S.A.* 34:15-17. It is therefore imperative, in contested cases, to discourage additional and unnecessary delay in the payment of temporary disability benefits, and we hold that *N.J.S.A.* 34:15-28.1 should be applied to that end.

214 N.J. Super. at 137, 518 A.2d at 533.

The order of the compensation court is affirmed.

AFFIRMED.

KIM NELSON-HOLST, APPELLEE AND CROSS-APPELLANT, V. TERRANCE L. IVERSON, APPELLANT AND CROSS-APPELLEE.

479 N.W.2d 759

Filed February 7, 1992. No. 89-656.

1. **Judgments: Appeal and Error.** In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous.
2. **Courts: Judgments: Appeal and Error.** In an appeal from a county court's judgment rendered in a bench trial of a law action, an appellate court conducts a review for error appearing on the record made in the county court.
3. _____: _____: _____. An appellate court reviewing a judgment in a bench trial of a law action in a county court does not reweigh the evidence, but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence.
4. **Assault: Battery: Damages.** The measure of recovery in a case of assault and battery is limited to compensatory damages.
5. **Damages: Appeal and Error.** Where recovery of damages is not a mere matter of computation and depends upon the intangible and quite subjective elements of pain and suffering, it will not be interfered with unless it is so excessive and so

grossly unresponsive to the evidence as to be indicative of passion, prejudice, mistake, or misconception.

6. **Verdicts: Remittitur.** Where a verdict is excessive, but not so much as to indicate passion or prejudice on the part of the jury, the error may be corrected by remittitur if the excess can be estimated with reasonable certainty.
7. **Damages: Remittitur.** Generally, where the damages awarded are greater than the amount claimed in the declaration or, from the facts disclosed by the evidence, are clearly excessive, and the illegal portion is distinguishable from the legal, the defect may usually be remedied by a remittitur of the excess if it can readily be calculated with reasonable certainty, whether the action is one of tort or on contract, and although such act of the successful litigant obviates an otherwise prejudicial error.
8. **Verdicts: Remittitur.** If there is no method by which a court can rationally ascertain the extent of the excess of a verdict, a remittitur cannot be required, for the reason that under such circumstances a remittitur is nothing more than a substitution of the judgment of the court for that of the fact finder.
9. **Verdicts: Appeal and Error.** A verdict may be set aside as excessive when, and not unless, it is so exorbitant as to be the result of passion, prejudice, mistake, or some other means not apparent in the record.
10. **Verdicts.** Passion or prejudice is shown when the verdict shocks the conscience.
11. **Damages: Remittitur: New Trial.** When a court cannot rationally ascertain the amount of excessiveness in an award of damages, a remittitur cannot properly be required or entered; rather, the proper action is setting aside the excessive damages award and granting a new trial on the issue of damages.

Appeal from the District Court for Douglas County, JAMES M. MURPHY, Judge, on appeal thereto from the County Court for Douglas County, ROBERT C. VONDRASEK, Judge. Judgment of District Court affirmed in part and in part reversed, and cause remanded with direction.

Edna R. Atkins for appellant.

Ralph E. Peppard for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

The subject of this appeal is the judgment obtained by Kim Nelson-Holst on her cause of action for assault and battery filed in the county court for Douglas County against Terrance L. Iverson. After the county court entered judgment in the amount of $7,800 for Nelson-Holst, Iverson appealed to the district court for Douglas County, which reduced the amount of

Nelson-Holst's judgment to $5,000.

Iverson has appealed to this court and claims that there is insufficient evidence for the judgment against him and that the judgment is excessive. Nelson-Holst assigns as error the district court's action in reducing the amount of the county court judgment. As the result of Nelson-Holst's assignment of error that the district court erred by reducing the judgment for damages, Nelson-Holst's response in her brief for the Iverson appeal is, in effect, a cross-appeal from the district court's judgment and is considered as a cross-appeal in this court.

STANDARD OF REVIEW

"In a bench trial of a law action, a trial court's factual findings have the effect of a verdict and will not be set aside unless clearly erroneous." *Oddo v. Speedway Scaffold Co.*, 233 Neb. 1, 2, 443 N.W.2d 596, 598 (1989). Accord, *Albee v. Maverick Media, Inc., ante* p. 60, 474 N.W.2d 238 (1991); *Alliance Nat. Bank v. State Surety Co.*, 223 Neb. 403, 390 N.W.2d 487 (1986).

In an appeal from a county court's judgment rendered in a bench trial of a law action, an appellate court conducts a review for error appearing on the record made in the county court. See, *Dammann v. Litty*, 234 Neb. 664, 452 N.W.2d 522 (1990); *Mason v. Schumacher*, 231 Neb. 929, 439 N.W.2d 61 (1989); *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987). See, also, Neb. Rev. Stat. § 25-2733(1) (Reissue 1989): "In all cases other than appeals from the Small Claims Court, the district court shall review the case for error appearing on the record made in the county court . . . ." An appellate court reviewing a judgment in a bench trial of a law action in a county court does not reweigh the evidence, but considers the judgment in the light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party, who is entitled to every reasonable inference deducible from the evidence. See, *Dammann v. Litty, supra*; *Mason v. Schumacher, supra*; *Holden v. Urban, supra*.

THE ASSAULT AND BATTERY

The following facts were established in the county court as a basis for Nelson-Holst's judgment against Iverson:

Nelson-Holst and Iverson are parents of Eric, their 15-month-old son, who at the time of the incident was in Nelson-Holst's physical custody subject to visitation by Iverson. On September 6, 1987, when Iverson failed to return Eric after visitation in Iverson's home, Nelson-Holst went to Iverson's place to get Eric.

When Nelson-Holst arrived, Iverson, who had been drinking alcohol, became abusive, refused to let her take Eric, and began to beat her with his fists. In the course of the quarrel, Iverson threw Nelson-Holst against the door and dragged her out of the house by her hair, stopping only when his mother intervened. As the result of the beating by Iverson, Nelson-Holst sustained bodily injury, which included a black eye, swelling of her head, a bruised nose, and multiple contusions on her body. Police were summoned on account of the quarrel. Nelson-Holst required medical attention for her injuries sustained in the beating. Her doctor's bill was $28. After the incident, Nelson-Holst experienced nightmares for which she was receiving counseling.

The county court entered judgment in the amount of $7,800 for Nelson-Holst and against Iverson on Nelson-Holst's cause of action for assault and battery. Iverson appealed to the district court and, in his appeal to that court, assigned errors similar to those which he has now assigned in his appeal to this court. The district court, without comment or explanation other than a notation on its docket sheet, reduced Nelson-Holst's damages award to $5,000. Iverson has appealed to this court, and, under the circumstances, we construe Nelson-Holst's brief as a cross-appeal.

SUFFICIENCY OF EVIDENCE

From the foregoing facts, we conclude that the evidence sustains the finding that Iverson tortiously assaulted and battered Nelson-Holst, who sustained damages as the result of the beating inflicted by Iverson. The county court's judgment, which has the effect of a verdict, is supported by the evidence and is not clearly erroneous.

DAMAGES AWARDED TO NELSON-HOLST

We have held that "[t]he measure of recovery in a case of

assault and battery is limited to compensatory damages. *Haumont v. Alexander*, 190 Neb. 637, 211 N.W.2d 119 (1973). Such damages include the nature of the injuries, and pain and suffering." *Duncza v. Gottschalk*, 218 Neb. 879, 880, 359 N.W.2d 813, 815 (1984). Moreover, as the court expressed in *Duncza*:

> Where recovery is not a mere matter of computation and depends upon the intangible and quite subjective elements of pain and suffering, it will not be interfered with unless it is so excessive and so grossly unresponsive to the evidence as to be indicative of passion, prejudice, mistake, or misconception. *Stewart v. Ritz Cab Co.*, 185 Neb. 692, 178 N.W.2d 577 (1970).

218 Neb. at 880, 359 N.W.2d at 814. We note that judgment for the plaintiff in *Duncza* was in the amount of $6,500 for damages sustained as the result of an assault and battery which caused a black eye to the plaintiff, bruised her face, and caused emotional upset to the plaintiff.

Since the district court in Nelson-Holst's case reduced the county court judgment from the amount of $7,800 to $5,000, but did not state or indicate the basis or reason for such reduction in the amount of the judgment, we can only conclude that the district court entered a remittitur of $2,800 without any reason expressed for the remittitur.

In *Barbour v. Jenson Commercial Distributing Co.*, 212 Neb. 512, 516-17, 323 N.W.2d 824, 826 (1982), this court stated:

> The law is well established that where a verdict is excessive, but not so much as to indicate passion or prejudice on the part of the jury, the error may be corrected by remittitur, if the excess can be estimated with reasonable certainty. *Hays v. County of Douglas*, 192 Neb. 580, 223 N.W.2d 143 (1974).
>
> . . . .
>
> Generally, where the damages awarded are greater than the amount claimed in the declaration, or, from the facts disclosed by the evidence, are clearly excessive, and the illegal portion is distinguishable from the legal, the defect may usually be remedied by a remittitur of the excess, if it can be readily calculated with reasonable certainty,

> whether the action is one of tort or on contract, and although such act of the successful litigant obviates an otherwise prejudicial error.

In *Barbour v. Jenson Commercial Distributing Co., supra*, a remittitur entered in the trial court was appropriate and was sustained on appeal, where the jury's verdict was for an amount in excess of the amount of damages established by the plaintiff's evidence. Since the amount of the verdict was too large in view of the undisputed evidence on contract damages, this court held that "the record establishes the amount of the excess with reasonable certainty" and sustained the remittitur entered in the trial court. 212 Neb. at 517, 323 N.W.2d at 827.

However,

> if there [is] no method by which a court [can] rationally ascertain the extent of the excess of a verdict, a remittitur [cannot] be required, for the reason that under such circumstances a remittitur [is] nothing more than a substitution of the judgment of the court for that of the [fact finder].

Main v. Sorgenfrei, 174 Neb. 523, 539, 118 N.W.2d 648, 658 (1962).

Recently, in *Crewdson v. Burlington Northern RR. Co.*, 234 Neb. 631, 643, 452 N.W.2d 270, 280 (1990), which was a wrongful death action, we stated:

> A verdict may be set aside as excessive when, and not unless, it is so exorbitant as to be the result of passion, prejudice, mistake, or some other means not apparent in the record. *Pitt v. Checker Cab Co.*, 217 Neb. 600, 350 N.W.2d 507 (1984). . . . We have also suggested that passion or prejudice is shown when the verdict shocks the conscience. See, *Woitalewicz v. Wyatt*, 229 Neb. 626, 631, 428 N.W.2d 216, 219 (1988) (stating that "[t]here is nothing to indicate that the award by the jury is the result of either passion or prejudice, nor does the verdict shock the conscience"); *Steinauer v. Sarpy County*, 217 Neb. 830, 841, 353 N.W.2d 715, 723 (1984) (explaining that "[t]o be sure, at some point the verdict may shock the conscience and, therefore, obviously be excessive").

Further, in *Crewdson v. Burlington Northern RR. Co., supra*,

we also stated: "Unless a court can rationally ascertain the extent of an excessive verdict, a remittitur cannot properly be required. A remittitur would amount only to a substitution of the judgment of the court for that of the jury. *Main v. Sorgenfrei*, 174 Neb. 523, 118 N.W.2d 648 (1962)." 234 Neb. at 645, 452 N.W.2d at 281. Finally, although we determined that the award in *Crewdson v. Burlington Northern RR. Co., supra*, was "clearly excessive, we [were] unable to determine the extent of the excess," and, therefore, the excessive verdict was set aside and the cause was remanded for a new trial on the issue of damages only. 234 Neb. at 645, 452 N.W.2d at 281.

When we consider the nature of Nelson-Holst's injuries sustained as the result of the beating by Iverson, including her pain and suffering from that ordeal, a judgment for $7,800 is not an amount that shocks the conscience of this court under the circumstances. To grant a remittitur in these circumstances would only be to substitute the judgment of this court for the judgment of the county court as the fact finder in Nelson-Holst's case. However, such a substitution of judgment is apparently what was done by the district court in reducing the amount of the judgment obtained by Nelson-Holst in the county court. As we pointed out in *Crewdson v. Burlington Northern RR. Co., supra*, when a court cannot rationally ascertain the amount of excessiveness in an award of damages, a remittitur cannot properly be required or entered; rather, the proper action is setting aside the excessive damages award and granting a new trial on the issue of damages. Even if the award of damages in Nelson-Holst's case was determined by the district court to be excessive, the district court, as an appellate court in Nelson-Holst's case, did not reverse the county court judgment and order a new trial on damages only but, instead, entered a remittitur, which was improper under the circumstances.

CONCLUSION

The judgment for Nelson-Holst in the county court is sustained by the evidence and is not excessive under the circumstances. As the result of the improper remittitur by the district court and reduction on appeal of the county court

judgment, we must reverse the judgment of the district court and remand this cause to the district court with direction to reinstate and affirm the county court judgment obtained by Nelson-Holst in the principal amount of $7,800.

AFFIRMED IN PART, AND IN PART
REVERSED AND REMANDED
WITH DIRECTION.

SHANAHAN, J., not participating in the decision.

IN RE APPLICATION OF NORTHLAND TRANSPORTATION, INC. NORTHLAND TRANSPORTATION, INC., APPELLANT, V. HERMAN BROTHERS, INC., ET AL., APPELLEES.

479 N.W.2d 764

Filed February 7, 1992. No. 89-673.

1. **Public Service Commission: Appeal and Error.** In an appeal from a decision of the Public Service Commission, the Supreme Court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question is unreasonable or arbitrary.
2. _____: _____. The Supreme Court does not act as an appellate public service commission and will sustain the action of the commission if there is evidence in the record to support it.
3. **Motor Carriers: Words and Phrases.** A contract carrier is one, other than a common carrier, which furnishes transportation service to meet the special needs of an individual shipper or shippers.
4. **Public Service Commission: Motor Carriers.** The Public Service Commission, in determining whether to issue a permit for contract carrier authority, must weigh the distinct needs of the shipper or shippers against the effect on and adequacy of existing common carrier service.
5. **Public Service Commission: Motor Carriers: Evidence.** Evidence that existing common carriers can satisfy the distinct needs of a shipper as well as a contract carrier renders issuance of a contract carrier permit inconsistent with the public interest, but proof that the services of common carriers are merely adequate to fulfill those needs is not conclusive when the applicant's service is better designed to fit the shipper's special requirements.
6. **Public Service Commission: Motor Carriers: Words and Phrases.** The "consistent with the public interest" standard for obtaining a contract carrier

permit is much less exacting than the "public convenience and necessity" standard for issuance of a common carrier certificate. The former means only that the proposed service does not conflict with the legislative policy of the state regarding transportation by motor vehicles.

7. **Public Service Commission: Motor Carriers: Evidence: Proof.** In a proceeding before the Public Service Commission to determine whether to issue a contract carrier permit, the initial burden is on the applicant to produce competent evidence that the proposed service is specialized and needed. Protesting common carriers may then present evidence that they are willing and able to perform the same specialized service. Upon production of such evidence by the protestants, the burden is again on the applicant to establish that it is better equipped and qualified to meet the special needs of the shipper or shippers than are the protestants.
8. **Public Service Commission: Motor Carriers: Federal Acts: Appeal and Error.** This court looks to decisions interpreting the federal Motor Carrier Act in construing the Nebraska statutes governing intrastate trucking.
9. **Public Service Commission: Appeal and Error.** When the Public Service Commission decides a case using an improper legal standard, it acts arbitrarily and therefore commits reversible error.
10. **Public Service Commission: Motor Carriers: Proof.** The Public Service Commission improperly tips the scales in favor of existing common carriers when it assigns to an applicant for contract carrier authority the burden of showing the inability of existing carriers to provide the same service the applicant proposes and when the commission exhibits a preference for common carriers over contract carriage.

Appeal from the Nebraska Public Service Commission. Reversed and remanded with directions.

Marshall D. Becker for appellant.

Jack L. Shultz and Gregory D. Barton, of Heron, Burchette, Ruckert & Rothwell, and James E. Ryan, P.C., for appellees.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

Northland Transportation, Inc. (Northland), appeals from a decision of the Public Service Commission denying its application for a contract carrier permit allowing it to transport fertilizer from the facilities of Farmland Industries in Hastings and Beatrice, Nebraska, to Wilcox, Nebraska, and points within a 25-mile radius of Wilcox.

Northland originally applied for a common carrier

certificate, but at a hearing held on March 9, 1989, amended its application to a request for contract carrier authority only. Protests to the application were filed by Wheeler Transport Service, Inc.; Central Transportation Company, Inc. (Central); Herman Brothers, Inc.; Wynne Transport Service, Inc.; and Schroetlin Tank Line, Inc. After Northland amended its application, Wheeler withdrew its protest. Of the remaining protestors, only Central and Herman Brothers appeared at the hearing.

FACTUAL BACKGROUND

The Wilcox Cooperative Association (the Association) is a farmers' cooperative in the business of buying and selling fertilizer products and grain for use by its approximately 300 members. The Association purchases its fertilizer from Farmland Industries, which has plants in both Hastings and Beatrice. The Hastings plant is located approximately 60 miles from Wilcox and supplies 95 percent of the Association's fertilizer needs.

Beginning in 1981, Central was responsible for hauling dry fertilizer, liquid fertilizer, and anhydrous ammonia from Farmland's plants to the Association's six storage facilities located in and around the Wilcox area. Central is a licensed common carrier authorized to haul each of these products. However, Central did not use its own equipment to haul the Association's fertilizer. Instead, Central leased trailers and the tractor trucks used to pull those trailers from Northland. In turn, Northland procured most of the tractors used for the Association account through a series of annual leases with Lester Johnson, an independent owner-operator who lived in Wilcox. Thus, Central did not dispatch trucks for the Association account. When the Association needed something hauled, it called either Northland or Johnson himself. Central's participation was limited to performing the billing functions and procuring the required insurance, though there is evidence that Northland actually acquired its own insurance. For providing these services, Central retained 7 percent of the revenue earned from the Association account.

Northland is authorized as a contract and common carrier of

bulk commodities by both the Interstate Commerce Commission and the Public Service Commission. However, neither Northland nor Johnson is authorized to haul anhydrous ammonia within the State of Nebraska. In the spring of 1988, a commission inspector notified Northland that Johnson could not legally haul anhydrous ammonia in Northland trailers based only on authority derived from Central through the leases. Northland's vice president and chief executive officer testified that prior to this notification, he was unaware that Northland's dealings with Johnson and the Association violated the commission's rules. Northland filed the application at issue in an effort to resolve this problem.

In support of its application, Northland introduced its balance sheet, which shows assets of $469,807, liabilities of $153,921, and total retained earnings of $285,886 for the year ending January 31, 1988. Northland also produced evidence that the amount of anhydrous ammonia hauled for the Association nearly tripled between 1985 and 1988 and was projected to increase again in 1989. The Association's general manager stated that he expected the Association's fertilizer business to keep growing due to its addition of a satellite facility south of Wilcox, a change of ownership at a competitor's plant, and a decrease in the number of acres set aside under a government farm program.

Northland also pointed to certain services specifically tailored to the Association's needs which common carriers cannot provide. The most fundamental of these services is Northland's willingness to allocate equipment exclusively to the Wilcox account during the peak fertilizer application period each spring. Northland developed the practice of loading three trailers in Hastings at the end of each day and then returning them to Wilcox for the night in order to get a headstart each morning. The Association's general manager testified that it is "essential" to his business that this practice continue. Because the Wilcox plant consists of six relatively small tanks rather than one large tank, an individual tank supplying a farmer can run out of ammonia in a very short time. Stationing Northland's trailers in Wilcox enables Johnson to deliver a load to that tank within 30 minutes, whereas if the Association had

to call Hastings for a common carrier the delivery might take half a day. Unlike Northland, which preloads its equipment and holds it overnight in Wilcox free of charge, common carriers will not do so without charging a demurrage fee.

Northland also noted that the limited capacity of the Association's tanks can result in the presence of too much fertilizer. A farmer may order a load of fertilizer for delivery on a particular morning only to encounter bad weather or an equipment breakdown that day. In such situations, Johnson and his drivers either divert the delivery to another tank, split the delivery among several tanks, or simply leave the loaded trailer sitting in Wilcox until a tank which can accommodate the load is available. The ability to respond in this manner results from a combination of Johnson's thorough knowledge of the current capacity of each tank and Northland's willingness to dedicate its trailers exclusively to the Wilcox account. There is evidence that if faced with a similar situation, a common carrier would either divert the load to another account or take it back to Hastings, charging the Association for the wasted trip. Such carriers will not allow their trailers to remain in a given location until an open tank is available, and their drivers may lack the detailed knowledge possessed by Johnson necessary to divert the load to another tank.

Finally, Northland presented evidence that it possesses the equipment necessary to service the Association's account. The Association requires pressure trailers for anhydrous ammonia, pneumatic trailers for dry fertilizer, and stainless steel trailers for liquid fertilizer. Northland possesses all three types of trailers, including 13 pneumatic units for use on the Association account. Northland's vice president and chief executive officer noted that the use of pneumatic equipment is becoming more prevalent in Wilcox because of a decrease in rail service there.

Central's general manager testified that his company is authorized to provide all the Association's trucking needs and that his company is willing and able to do so. He stated that the use of leased drivers is common in the industry and that Central is willing to continue the lease agreement with Johnson. He also stated that Central owns or operates 50 to 60 tractor units and 150 to 160 trailers, and has equipment suitable for the shipment

of fertilizer stationed throughout the Wilcox area. He testified that his company could dedicate such equipment to the Wilcox plant "on a dispatch basis" and "might" even allocate equipment there if the situation demanded it. He admitted that Central does not operate any pneumatic equipment, though he stated it would purchase or lease such equipment if the need arose. He concluded that Central opposed Northland's application to prevent the loss to Northland of business normally handled by Central.

The Midwest regional manager for Herman Brothers echoed the points made by Central. He noted that Herman Brothers holds the necessary authority for the Association account and is desirous of gaining that business. Herman Brothers possesses trailers suitable for hauling all three types of fertilizer used by the Association, and that equipment was not operating at full capacity at the time of the hearing. It has four ammonia "bottles" located in Holdrege, Nebraska, which is only 8 miles from Wilcox, as well as additional ammonia bottles and pneumatic tanks located in Grand Island, Nebraska. Herman Brothers' Midwest regional manager indicated that the placement of ammonia bottles in Holdrege enabled the company to "pick up some additional business out there." He also expressed a willingness to lease equipment operators during the peak season and stated that Northland's evidence revealed no service which his company could not also provide.

Obviously, the advantages to the Association of Johnson's presence in Wilcox is one of the key aspects of this case. Indeed, Johnson actually performed many functions normally the responsibility of the Association, such as keeping a running inventory of the area tanks and taking it upon himself to get them filled when necessary without waiting for a farmer to call. There is evidence that Johnson would prefer to continue leasing his services to Northland rather than some other common carrier. The peak season for applying fertilizer occurs during March and April of each year, when 85 to 90 percent of all anhydrous ammonia transported during the year is hauled. Northland's annual leases guaranteed Johnson work during the remainder of the year, and he expressed a reluctance to lease his services to another common carrier for fear he would lose this

additional income.

ASSIGNMENTS OF ERROR

Northland's 10 assignments of error combine to argue that the commission erred in (1) failing to find that the authority sought would provide a unique service designed to meet the distinct needs of the supporting shipper and (2) finding that the evidence does not show that granting the application sought would be consistent with the public interest.

STANDARD OF REVIEW

In an appeal from a decision of the Public Service Commission, the Supreme Court examines the record to determine whether the commission acted within the scope of its authority and whether the evidence shows that the order in question is unreasonable or arbitrary. *In re Application of Koch Service*, 228 Neb. 631, 423 N.W.2d 767 (1988). This court does not act as an appellate public service commission and will sustain the action of the commission if there is evidence in the record to support it. *In re Application of Silvey Refrig. Carr.*, 226 Neb. 668, 414 N.W.2d 248 (1987).

CONTRACT CARRIAGE IN NEBRASKA

A contract carrier is defined as one, other than a common carrier, which furnishes transportation service to meet the special needs of an individual shipper or shippers. *Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp.*, 188 Neb. 584, 198 N.W.2d 195 (1972) (*Wells Fargo II*), citing Neb. Rev. Stat. § 75-302 (Reissue 1972). To qualify for a contract carrier permit, an applicant must show (1) that it is fit, willing, and able to properly perform the service of a contract carrier and to conform to the applicable statutes and lawful requirements, rules, and regulations of the commission and (2) that the proposed operation will be consistent with the public interest by providing services designed to meet the distinct needs of each customer or class of customers. Neb. Rev. Stat. § 75-311 (Reissue 1986).

In *Hagen Truck Lines, Inc. v. Ross*, 174 Neb. 646, 119 N.W.2d 76 (1963), this court discussed the relationship between contract and common carriers. In that case Hagen Truck Lines

applied for authority as a contract carrier to haul meat and dairy products for various packing plants in Nebraska. The packing plants desired the service because the applicant could provide refrigerated equipment and truck-to-store service not offered by common carriers. Several common carriers protested, asserting that they could provide the desired service and that granting the application would reduce their profits, in derogation of the public interest. The commission granted the application, and the protestants appealed to this court.

In affirming the commission's decision, the court held that the potential loss of revenue by common carriers resulting from issuance of a contract carrier permit does not necessarily render the permit inconsistent with the public interest. Though that is a relevant factor, the court indicated that if the desirability of satisfying the shipper's distinct needs outweighs the detrimental effect on existing carriers, granting the authority sought is consistent with the public interest.

Thus, the commission, in determining whether to issue a permit for contract carrier authority, must weigh the distinct needs of the shipper or shippers against the effect on and adequacy of existing common carrier service. *In re Application of Koch Service, supra*; *Wells Fargo II, supra*; *Wells Fargo Armored Service Corp. v. Bankers Dispatch Corp.*, 186 Neb. 261, 182 N.W.2d 648 (1971) (*Wells Fargo I*); *Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp.*, 183 Neb. 229, 159 N.W.2d 310 (1968); *Hagen Truck Lines, Inc., supra.* Though evidence that common carriers can satisfy the *distinct* needs of a shipper as well as a contract carrier renders issuance of a permit inconsistent with the public interest, mere proof that the services of common carriers are *adequate* to fulfill the shipper's needs is not conclusive when the applicant's service is better designed to fit the shipper's special requirements. *Wells Fargo II, supra.* Moreover, the "consistent with the public interest" standard for obtaining a contract carrier permit is much less exacting than the "public convenience and necessity" standard for issuance of a common carrier certificate. The former means only that the proposed service does not conflict with the legislative policy of the state regarding transportation by motor vehicles. *Wells Fargo I, supra*; *Samardick of Grand*

Island-Hastings, Inc., supra; *Hagen Truck Lines, Inc., supra*.

In *Wells Fargo II, supra*, this court set forth the proper procedure for determining whether a grant of contract carrier authority is consistent with the public interest. We held that the initial burden is on the applicant to produce competent evidence that the proposed service is specialized and needed. Protesting common carriers may then present evidence that they are willing and able to perform the same specialized service. Upon production of such evidence by the protestants, the burden is again on the applicant to establish that it is better equipped and qualified to meet the special needs of the shipper or shippers than are the protestants. *Id.*, citing *Samardick of Grand Island-Hastings, Inc., supra*.

THE COMMISSION'S ORDER

In its order denying Northland's application, the commission stated, "[T]he evidence falls short of the required showing that a grant of additional authority would be consistent with the public interest. Applicant showed no reason why the owner-operator . . . . could not lease his equipment to one of the common carriers already in the field . . . ."

Later in its order, the commission also stated, "It is not in the public interest to siphon away choice customers from common carriers and institute contract carriage. The transportation system the Legislature has charged this Commission to foster and protect is based upon sound common carriers." Because these findings reflect a misapplication of the aforementioned substantive and procedural principles, we reverse.

The original version of § 75-311 was enacted in 1937, see Neb. Rev. Stat. § 75-235 (Reissue 1943), and the current version is found at § 75-311 (Reissue 1989). The statute has been patterned after its counterpart in the Motor Carrier Act, passed by Congress in 1935. See Motor Carrier Act, ch. 498, § 209(b), 49 Stat. 543, 553 (1935) (current version at 49 U.S.C. § 10923 (1988)). For this reason, and because it is the policy of the Legislature to cooperate with the federal authorities in administering and enforcing the Motor Carrier Act, this court looks to decisions interpreting the federal act for guidance in construing our own statute. See, *Preisendorf Transp., Inc. v.*

Herman Bros., Inc., 169 Neb. 693, 100 N.W.2d 865 (1960); Neb. Rev. Stat. § 75-301(6) (Reissue 1986).

In *I. C. C. v. J-T Transport Co.*, 368 U.S. 81, 82 S. Ct. 204, 7 L. Ed. 2d 147 (1961), J-T Transport Company and Elvin L. Reddish applied separately for authority to haul certain goods as contract carriers. The Interstate Commerce Commission denied both applications. In denying J-T Transport's application, the ICC stated that " '[t]here is, in effect, a presumption that the services of existing carriers will be adversely affected by a loss of "potential" traffic, even if they may not have handled it before.' " *Id.* at 368 U.S. at 84, quoting *J-T Transport Co., Inc., Extension—Columbus, Ohio*, 79 M.C.C. 695 (1959). The ICC concluded that J-T Transport failed to establish the inability of existing carriers to meet the shipper's special needs and therefore failed to rebut the presumption. The ICC relied on similar reasoning in rejecting Reddish's application.

The U.S. Supreme Court held that the ICC erred in both cases. The Court interpreted the Motor Carrier Act as requiring a weighing of the distinct need of a shipper for contract carriage against the effect on and adequacy of existing services. The purpose of the act, the Court determined, is not to protect the status quo of existing carriers, but to establish a system whereby new contract carriage is allowed if the distinct needs of the shipper indicate its desirability. Finally, the Court delineated the proper procedure for determining whether to grant a permit for contract carrier authority. The Court stated that the applicant must first demonstrate that the proposed service is specialized and tailored to a distinct need, at which point the protestants may present evidence as to their willingness and ability to meet that distinct need. If that is done, the Court noted, the burden shifts to the applicant to show it is better equipped to fulfill the shipper's needs.

Having reviewed the substantive and procedural rules governing applications for contract carrier permits, the Court held that the ICC erred in denying the authority sought. The Court reasoned that the ICC's presumption of an adverse effect on existing carriers and its assignment to the applicants of the burden of proving the inadequacy of existing services

improperly tipped the scale in favor of the protestants.

It is evident that the substantive and procedural standards enunciated in *J-T Transport Co.* closely resemble those governing applications for contract carrier authority under § 75-311. Here, as in that case, the commission improperly tipped the scales in favor of the protestants in denying Northland's application.

The commission concluded that Northland failed to show any reason why Johnson could not lease his equipment to one of the common carriers already in the field. It is not the applicant's burden to establish the inability of existing common carriers to provide the same specialized service it proposes to provide. As noted earlier, Northland's initial burden was merely to show that the proposed services are specialized and tailored to the Association's distinct needs. See *Wells Fargo II, supra.* Northland satisfied this burden with evidence of its willingness to dedicate equipment to the Association account, to station trailers in Wilcox overnight without charging a demurrage fee, and to provide flexibility in the delivery of fertilizer to the first available tank, as well as with evidence regarding its relationship with Johnson and its possession of the necessary equipment. Once such evidence was adduced, the burden was then on the protestants to show they could provide the same specialized service. *Id.* We conclude, therefore, that the commission erred in assigning to Northland the burden of explaining why the protestants could not provide the same services.

Another basis relied upon by the commission was its finding that it is not in the public interest to "siphon away" choice customers from common carriers and that the transportation system is "based upon sound common carriers." Though the commission did not expressly use the word "presumption," as did the ICC in *J-T Transport Co.*, this finding reflects at least a preference for common carriers over contract carriage, inconsistent with Nebraska law. It is well settled that in deciding whether to grant a contract carrier permit, the commission is to weigh the special needs of the shipper desiring the contract carriage against the adequacy of and effect on existing common carrier service. *In re Application of Koch Service*, 228 Neb. 631,

423 N.W.2d 767 (1988); *Wells Fargo II, supra*; *Samardick of Grand Island-Hastings, Inc. v. B.D.C. Corp.*, 183 Neb. 229, 159 N.W.2d 310 (1968); *Hagen Truck Lines, Inc. v. Ross*, 174 Neb. 646, 119 N.W.2d 76 (1963). The fact that existing common carriers will lose revenue if the permit is granted is not necessarily dispositive. The proposed service may still be consistent with the public interest if it is needed and the applicant can meet the shipper's distinct needs better than can the protesting common carriers. We conclude that the commission's implicit suggestion that it is *always* inconsistent with the public interest to grant a contract carrier permit when existing common carriers can adequately serve the shipper improperly tipped the scales against Northland in this case.

When the commission decides a case using an improper legal standard, it acts arbitrarily and therefore commits reversible error. See *Dilts Trucking, Inc. v. Peake, Inc.*, 197 Neb. 459, 249 N.W.2d 732 (1977). The decision is therefore reversed and the cause remanded with directions to the commission to issue the contract carrier permit to Northland.

REVERSED AND REMANDED WITH DIRECTIONS.

CLARENCE E. FISHER, APPELLEE, V. CITY OF GRAND ISLAND, NEBRASKA, APPELLANT.

479 N.W.2d 772

Filed February 7, 1992. No. 89-682.

1. **Statutes.** Where one statute refers to another and incorporates it, and the incorporated statute is subsequently repealed, the statute repealed, having been incorporated as part of the one referring to it, remains in force so far as the adopting statute is concerned.
2. **Municipal Corporations: Pleadings: Time: Claims: Appeal and Error.** In an appeal pursuant to Neb. Rev. Stat. § 16-727 (Reissue 1987), the plaintiff is required to file a petition in the district court within 50 days after the denial of the claim.
3. **Municipal Corporations: Stipulations: Pleadings: Good Cause: Dismissal and Nonsuit: Appeal and Error.** Unless the parties stipulate that the cause may be tried on the pleadings below, and in the absence of good cause shown, the

plaintiff in an appeal under Neb. Rev. Stat. § 16-727 (Reissue 1987) who fails to file a petition in the district court shall become nonsuited.

Appeal from the District Court for Hall County: JOSEPH D. MARTIN, Judge. Reversed and remanded with directions to dismiss.

Keith Sinor, Grand Island City Attorney, for appellant.

Daniel M. Placzek, of Luebs, Dowding, Beltzer, Leininger, Smith & Busick, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

The City of Grand Island (City) has appealed from the judgment of the district court finding that the claimant, Clarence E. Fisher, was entitled to receive pension benefits under Neb. Rev. Stat. § 16-1039(1) (Reissue 1987) before reaching the age of 55 years.

The record shows that Fisher began employment by the City as a firefighter on February 1, 1965. On that date, the pension provided for firefighters in cities of the first class having a paid fire department was set out in Neb. Rev. Stat. § 35-201 (Cum. Supp. 1963) (Plan A). Effective August 7, 1965, a second pension plan was established for firefighters in first-class cities by 1965 Neb. Laws, L.B. 415, codified at Neb. Rev. Stat. §§ 35-204 to 35-215 (Cum. Supp. 1965) (Plan B). Both plans allowed firefighters to retire after 21 years of service and to receive pension payments after reaching the age of 55. Under both plans, pension payments were to be at least 50 percent of the salary the retiring firefighter received at the time he retired. Neb. Rev. Stat. § 35-216 (Cum. Supp. 1965) provided:

> Any firemen serving in the paid fire department of a city of the first class on August 7, 1965 may elect whether to become subject to the provisions of sections 35-204 to 35-214 or to remain subject to the provisions of sections 35-201 to 35-203.01. *Such election shall be made in writing not later than thirty days after August 7, 1965 and shall be irrevocable.*

(Emphasis supplied.)

On October 20, 1965, Fisher signed a form electing to be subject to the provisions of Plan B. Fisher testified in district court that Chief Simpson told him to either sign this document "or hit the door."

A third pension system became effective January 1, 1984. See Neb. Rev. Stat. §§ 16-1020 et seq. (Reissue 1987). Section 16-1039(1) provides:

> All cities of the first class having a paid fire department *shall* pension all firefighters . . . who were serving as such on August 7, 1965, *and who did not elect coverage under the provisions of sections 35-204 to 35-215 as they existed prior to January 1, 1984* [Plan B], whenever such firefighters shall have first served in such fire department for the period of twenty-one years and shall elect to retire from active service and go upon the retired list.

(Emphasis supplied.)

On February 1, 1986, Fisher completed 21 years of service and was 47 years old. When he resigned on September 29, 1987, Fisher was being paid a salary of $806.76 every 2 weeks. He had contributed $2,202.62 to the firefighters' pension fund since February 1, 1986.

On December 16, 1987, Fisher submitted a claim for pension benefits from the City and sought reimbursement for all contributions he had made to the pension plan after February 1, 1986, pursuant to §§ 16-1039 and 16-1040. The city council informed Fisher of the denial of his claim in a letter dated March 1, 1988, and Fisher appealed to the district court, pursuant to Neb. Rev. Stat. § 16-727 (Reissue 1987). The City's special appearance and subsequent motion for nonsuit were denied.

After a hearing, the district court entered judgment in favor of Fisher and against the City for pension benefits of $403.38 every 2 weeks from and after September 29, 1987, and entered judgment in favor of Fisher and against the City for the refund of $2,202.62 in pension contributions, plus prejudgment interest. The judgment was based on the court's finding that the election of benefits made by Fisher on October 20, 1965, was involuntary and not made within 30 days after August 7, 1965, and, therefore, was ineffective, invalid, and void. From that

judgment the City has appealed.

Fisher contends that § 16-1039(1) does not require that he be 55 years old before becoming eligible for pension payments. However, because we determine that the district court should have nonsuited Fisher for failure to file a petition in the district court, we do not consider the parties' arguments relating to § 16-1039.

The City contends that Fisher should have been nonsuited for failure to file a petition in the district court. Fisher timely appealed the denial of his claim, pursuant to the procedure set out in Neb. Rev. Stat. §§ 16-727 et seq. (Reissue 1987). Section 16-729 provides that such appeals "shall be entered on the docket of the court, tried, and determined as appeals from *justice courts*."

As we have noted in previous cases, justice courts were abolished in this state by the passage of 1972 Neb. Laws, L.B. 1032. See, e.g., *Estate of Tetherow v. State*, 193 Neb. 150, 226 N.W.2d 116 (1975) (eminent domain proceeding); *Knoefler Honey Farms v. County of Sherman*, 193 Neb. 95, 225 N.W.2d 855 (1975) (appeal from county board of equalization), *overruled on other grounds, United Way of the Midlands v. Douglas County Board of Equalization*, 199 Neb. 323, 259 N.W.2d 270 (1977) (construction of Neb. Rev. Stat. § 77-202.04 (Reissue 1990)); *Singleton v. South Platte Nat. Resources Dist.*, 215 Neb. 504, 339 N.W.2d 751 (1983) (eminent domain proceeding). Section 16-729 clearly incorporates the former statutes relating to appeals from justice courts. In general, "where one statute refers to another and incorporates it, which incorporated statute is subsequently repealed, the statute repealed, having been incorporated as part of the one referring to it, remains in force so far as the adopting statute is concerned." *Estate of Tetherow v. State, supra* at 155, 226 N.W.2d at 119.

As stated above, Neb. Rev. Stat. §§ 27-1301 through 27-1315 (Reissue 1964), pertaining to justice courts, were repealed in 1972. Under § 27-1301, the perfection of an appeal from a justice court vested in the district court "jurisdiction of all the issues presented to the justice of the peace by the pleadings" or, in this case, to the city council by Fisher's notice of claim.

Section 27-1305 provided that "[t]he plaintiff in the court below shall be the plaintiff in the district court; and the parties shall proceed, in all respects, in the same manner as though the action had been originally instituted in such court." Sections 27-1305 and 27-1306 required that new pleadings be filed in the district court unless the parties stipulated to the contrary. See *Traill v. Ostermeier*, 140 Neb. 432, 300 N.W. 375 (1941). Specifically, the plaintiff was required to file a petition "as required in civil cases in the district court" within 50 days from and after the date of the rendition of the judgment in the court below. Finally, § 27-1307 provided that if the plaintiff in the action before the justice of the peace perfected an appeal to the district court but failed to file a petition within 50 days from the date of the judgment of the justice court, "the plaintiff *shall* become nonsuited" absent a showing of good cause. (Emphasis supplied.)

Although the filing of a petition within the 50-day period was not a jurisdictional step, see *Estate of Tetherow v. State, supra*, the parties did not stipulate that the case be tried without new pleadings, and the district court erred in failing to grant the City's motion for nonsuit because Fisher did not file a petition in the district court.

The judgment of the district court is reversed, and the cause is remanded with directions to dismiss Fisher's appeal. We make no determination on the merits concerning the parties' contentions relating to § 16-1039.

REVERSED AND REMANDED WITH DIRECTIONS TO DISMISS.

WHITE, J., dissenting.

I dissent for the reasons set forth in my dissent in *School Dist. No. 17 and Westside Comm. Schools v. State*, 210 Neb. 762, 316 N.W.2d 767 (1982).

GRANT, J., joins in this dissent.

SHANAHAN, J., dissenting.

Not since "Lazarus, come forth" has there been such a summons for the dead to associate with the living, for this court raises from Nebraska's dead statutes a procedure, killed by repeal in 1972, which is today used to defeat Clarence Fisher's

action for pension benefits. The deceased procedure concerning an appeal from a justice of the peace court which departed statutory life nearly 20 years ago is, nonetheless, resurrected by judicial invocation of the "Lazarus Rule" expressed by the majority: "In general, 'where one statute refers to another and incorporates it, which incorporated statute is subsequently repealed, the statute repealed, having been incorporated as part of the one referring to it, remains in force so far as the adopting statute is concerned.' "

In Fisher's case, there are two statutes which existed before and during 1972 and, according to the majority, dispose of Fisher's appeal. First, there is Neb. Rev. Stat. § 16-727 (Reissue 1987), which authorizes a claimant's appeal from a city council's disallowance of a claim, an appeal that is commenced and perfected by the claimant's serving a notice of appeal on the city clerk and executing the appropriate surety bond for the appeal. Correspondingly, Neb. Rev. Stat. § 16-728 (Reissue 1987) allows a taxpayer to appeal from allowance of a claim against a city. The second crucial statute, according to the majority, is Neb. Rev. Stat. § 16-729 (Reissue 1987), which states:

> The [city] clerk, upon such appeal being taken, and being paid the proper fees therefor, including fees for filing the same in the district court, shall make out a transcript of the proceedings of the council, mayor, and other officers as relate to the presentation and allowance or disallowance of such claim, and shall file the same with the clerk of the district court within thirty days after the decision allowing or disallowing the claim and paying the proper commencement fees. Such appeal shall be entered on the docket of the court, tried, and determined as appeals from justice courts, and costs shall be awarded thereon in like manner. No appeal bond shall be required of the city by any court in the case of an appeal by the city, and judgment shall be stayed pending such appeal.

The majority applies the Lazarus Rule in view of 1972 Neb. Laws, L.B. 1032, legislation enacted almost 20 years ago for abolition of the justice of the peace courts in Nebraska. In 1972, L.B. 1032 was a massive overhaul of the judicial system of the

State of Nebraska. Motivation for L.B. 1032 was a desire to completely eliminate the state's justice of the peace courts in response to a presidential report which had thoroughly discredited the justice of the peace courts as a part of the judicial system throughout the United States. After amendment of the Nebraska Constitution to eliminate the justice of the peace courts, the Legislature reorganized the judicial system in view of the abolished justice of the peace courts in Nebraska. Resulting legislation comprised 287 separate sections, which were printed on 121 single-spaced pages. During floor debate on L.B. 1032, some of the Legislature acknowledged that the bill was so voluminous and extensive that errors and omissions were inevitable.

In *Leach v. Dept. of Motor Vehicles*, 213 Neb. 103, 327 N.W.2d 615 (1982), this court, recognizing the basic unfairness of the Lazarus Rule, held that the rule applies only when a designated statute was, by reference to that specific and, therefore, identified statute, incorporated into another statute. Therefore, in *Leach*, the court held that statutory incorporation of other legislation which is part of a general scheme of statutory law on a subject fails to restrict the incorporating statute to the material incorporated by reference, or, as the *Leach* court stated: "We believe that when a statute adopts the general law on a particular subject rather than a specific statute, it adopts not only the existing law but later legislation on the subject." 213 Neb. at 107, 327 N.W.2d at 618.

Section 16-729 (Reissue 1987), invoked by the majority as a basis for its decision, provided that appeals such as Fisher's "shall be entered on the docket of the [district] court, tried, and determined as appeals from justice courts, and costs shall be awarded thereon in like manner." Because § 16-729 made no specific reference to any particular statutory provision in the previous act pertaining to appeals from justice of the peace courts, § 16-729 incorporated only the general and composite law pertaining to the former justice of the peace courts and, therefore, adopted all later legislation abolishing justice of the peace courts and, consequently, eliminating the procedure for an appeal from those courts.

In fashioning and utilizing the Lazarus Rule, this court has

continually failed to explain why a generic statutory expression incorporated into another statute remains effectual in the incorporating and subsisting statute after repeal of the statute which was the source for the incorporation. Legal logic dictates that reference to a general subject in the incorporated statute also vanishes when the incorporated statute disappears by repeal. If general reference to appeals under the repealed justice of the peace act were deleted, as common sense requires, § 16-729 (Reissue 1987) would provide in relevant part: "Such appeal shall be entered on the docket of the [district] court, tried, and determined ~~as appeals from justice courts,~~ and costs shall be awarded[.] ~~thereon in like manner.~~" (Deletion indicated by lined-out language.) Fortunately for the future, it is precisely that deletion which an awakened Nebraska Legislature achieved by L.B. 1, introduced and passed during the 1991 session, legislation effective as of September 6, 1991, for amendment of § 16-729 in pertinent part regarding an appeal from a city council's action on a claim: "*Such appeal shall be entered on the docket of the court, tried, and determined and costs awarded thereon in the manner provided in sections 25-1901 to 25-1937.*" (Emphasis supplied.) § 16-729 (Supp. 1991).

Bearing in mind that Fisher's appeal to the district court was perfected on March 2, 1988, and that the district court's judgment awarding pension benefits to Fisher was entered on April 11, 1989, § 16-729 (Supp. 1991) had been effective for 3 months before this court heard the present appeal on December 6, 1991. Therefore, when this court heard the appeal in Fisher's case and, consequently, at the time of its decision in this appeal, § 16-729 no longer referred to the procedure applicable to an appeal from a decision in a justice of the peace court; rather, § 16-729, as amended in 1991, directs that appeals such as the Fisher case are governed by Neb. Rev. Stat. §§ 25-1901 to 25-1937 (Reissue 1989 & Supp. 1991), none of which authorize the Draconian action taken by this court to defeat Fisher's claim and deprive him of pension benefits recognized in the district court's judgment against the city. In *Lindgren v. School Dist. of Bridgeport*, 170 Neb. 279, 283, 102 N.W.2d 599, 604 (1960), which involved a question of timeliness for a bill of exceptions

on appeal, this court stated: " 'A litigant has no vested right in the mode of procedure, and an action commenced before an enactment changing the procedure in the court where the action is pending, after the enactment becomes effective, is properly triable under the changed method.' " (Quoting from *Lovelace v. Boatsman*, 113 Neb. 145, 202 N.W. 418 (1925).) See, also, *Hancock v. State ex rel. Real Estate Comm.*, 213 Neb. 807, 331 N.W.2d 526 (1983) (standard of review, as a procedural matter, is governed by statutes in effect when the appeal is heard); *Happy Hour, Inc. v. Nebraska Liquor Control Commission*, 186 Neb. 533, 184 N.W.2d 630 (1971); *Lovelace v. Boatsman*, *supra*.

Section § 25-1937 (Supp. 1991), mentioned in the 1991 amendment to § 16-729, states:

> When the Legislature enacts a law providing for an appeal without providing the procedure therefor, the procedure for appeal to the district court shall be the same as for appeals from the county court to the district court in civil actions. Trial in the district court shall be de novo upon the issues made up by the pleadings in district court. Appeals from the district court to the Court of Appeals shall be taken in the same manner provided by law for appeals from the district court in civil cases. This section shall not apply if the Administrative Procedure Act otherwise provides.

Use of § 25-1937, even before the 1991 amendment of § 16-729, accommodates the commonsense expectations of courts and lawyers who examined Nebraska's legislation to ascertain a procedure for an appeal in situations such as Fisher's, a procedure which allowed an orderly progression of appeals concerning a city council's action on a claim against the city. It is apparently that rational process which Fisher's lawyer actually pursued. In Fisher's case, however, experience and ordinary expectations betrayed the practitioner.

As matters now stand, the Lazarus Rule, utilized by the majority, arguably amounts to a denial of due process required by the Constitutions of the United States and Nebraska because

> due process requires the government to give notice to individuals of government actions which would deprive

> those individuals of a constitutionally protected life, liberty, or property interest. When individual interests are adversely affected by legislative action, there is no notice issue, because publication of a statute is *normally* considered to put all individuals on notice of a change in the law of a jurisdiction.

(Emphasis supplied.) J. Nowak, R. Rotunda, & J. Young, Constitutional Law § 13.8 at 489 (3d ed. 1986).

The situation in Fisher's case is decidedly abnormal in view of reference to statutes which have been repealed for nearly 20 years and which exist only in dust-covered books in a dark, musty backroom of a law library, conducive to raising mushrooms, or which have been placed beneath an uneven table leg to stop wobbling.

However, since this court wishes to rely on the Lazarus Rule and act as a magisterial mortician, caring for a body of law long since demised, it is noteworthy that § 16-729 (Reissue 1987) is inapplicable to preclude Fisher's action, since § 16-729 supplies directives to a city clerk and the district court which hears an appeal. Regarding appeals brought under § 16-727 (claimant's appeal) or § 16-728 (taxpayer's appeal), § 16-729 directs that a city clerk, within 30 days after a city council's decision on a claim, must provide the district court with a transcript of the proceeding in question. Thereafter, the district court resolves the appeal. Also, § 16-729 exempts a city from an appeal bond. However, the all-important and pivotal point in Fisher's case is that while § 16-729 governs conduct of a city clerk and the district court, § 16-729 imposes no obligation on an appellant.

Nevertheless, Fisher's written claim, contained in the transcript filed with the district court, clearly expressed the nature of his claim for pension benefits and the relief sought. By supplying that information to the court, Fisher's claim qualified as a petition. See *In re Interest of L.D. et al.*, 224 Neb. 249, 258, 398 N.W.2d 91, 98 (1986): "A petition, as a pleading, is a plaintiff's or claimant's written statement of fact which invokes the jurisdiction of a court, sets out a cause of action, and seeks relief." See, also, *Paxton v. State*, 59 Neb. 460, 81 N.W. 383 (1899). " 'Proper pleading requires a petition to state in logical and legal form the facts which constitute the

plaintiff's cause of action, define the issues to which the defendant must respond at trial, and inform the court of the real matter in dispute.' " *League v. Vanice*, 221 Neb. 34, 43, 374 N.W.2d 849, 855 (1985). Accord, *Holden v. Urban*, 224 Neb. 472, 398 N.W.2d 699 (1987); *Rosnick v. Marks*, 218 Neb. 499, 357 N.W.2d 186 (1984); *Russell v. First York Sav. Co.*, 218 Neb. 112, 352 N.W.2d 871 (1984).

Moreover, even in an appeal from a justice of the peace court, absence of a petition on appeal, under the now defunct procedure for an appeal from a justice of the peace court, did not automatically authorize nonsuit or dismissal of an appellant's action in the district court; rather, an appellant was permitted to show "good cause" for the absence of a petition filed on appeal. See Neb. Rev. Stat. § 27-1307 (Reissue 1964) (repealed 1972). See, also, *City of Seward v. Gruntorad*, 158 Neb. 143, 62 N.W.2d 537 (1954) (pursuant to § 27-1307, a district court must determine whether good cause has been shown for the absence of a petition on appeal); *In re Estate of Meyers*, 152 Neb. 165, 40 N.W.2d 536 (1950). In any event, if the procedure for an appeal from a justice of the peace court were applicable, as espoused by the majority, Fisher is entitled to the opportunity for showing good cause regarding an absent petition, assuming that there is such an absence. Yet, the majority's decision deprives Fisher of the opportunity to show good cause, a right granted under the very law used by the majority to deny Fisher's pension benefits.

Because L.B. 1032 in 1972 repealed the statutory provisions for an appeal from the former justice of the peace courts and resulted in an absence of a procedure for an appeal from a city council's disallowance of a claim, and, moreover, since the 1991 amendment of § 16-729 has removed reference to an extinct procedure relative to justice of the peace courts, the procedure set forth in § 25-1937 governed Fisher's appeal. Under the circumstances, the City of Grand Island was not entitled to dismissal of Fisher's action in the district court. For that reason, the district court's judgment should have been affirmed.

Consequently, while the Legislature has commendably removed the living dead from § 16-729, nevertheless, as far as the dead justice of the peace procedure is concerned, its ghost

walks in this court's decisions.

GRANT, J., joins in this dissent.

MICHAEL JAY WYMORE, SR., APPELLANT, V. KATHRYN JULIA WYMORE, APPELLEE.

479 N.W.2d 779

Filed February 7, 1992. No. 89-857.

1. **Divorce: Time: Jurisdiction.** The 60-day waiting period before a divorce suit can be heard, tried, or decided is a jurisdictional requirement.
2. _____: _____: _____. For purposes of measuring the 60-day waiting period in a divorce suit, the rule is to exclude the first day and include the whole of the last day in said period.
3. **Divorce: Evidence: Trial: Time.** A divorce decree based upon evidence adduced at a null and void hearing is itself a nullity, even if it is entered after expiration of the waiting period.
4. **Actions: Jurisdiction.** Either party to an action may raise the jurisdictional issue at any time.
5. **Courts: Judgments: Appeal and Error.** When the record indicates that the decision of the trial court is correct, although for reasons different from those relied upon below, an appellate court will affirm the trial court's decision.

Appeal from the District Court for Douglas County: LAWRENCE J. CORRIGAN, Judge. Affirmed.

S. Caporale for appellant.

Rita L. Melgares, of Qualley & Associates, and, on brief, Joseph Lopez Wilson for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

This appeal involves a dissolution of marriage proceeding in the Douglas County District Court. On January 27, 1989, the petitioner-appellant, Michael Jay Wymore, Sr., filed a petition for dissolution of his marriage to the respondent-appellee, Kathryn Julia Wymore. The appellee filed a voluntary appearance on March 13, waiving service of process and

reserving her statutory time for filing a responsive pleading. Thereafter, the appellee failed to answer or otherwise plead. The trial court held a hearing on May 10 and the next day entered a default decree dissolving the marriage, awarding custody of the parties' only child to the appellee, and dividing the marital property.

Though the May 11 decree awarded custody to the appellee, it also included a finding that the best interests of the child favored awarding custody to the appellant. In an apparent effort to rectify this inconsistency, the trial court, on May 19, issued an "amended decree" identical in every respect to the May 11 decree except that it awarded custody to the appellant rather than the appellee and changed the finding regarding the place of marriage from "Natchez Adams, Missouri" to "Natchez, Adams County, Mississippi."

The appellee filed a motion on July 5 to set aside the aforementioned decrees. In support of her motion, she alleged that neither party had resided in Nebraska for at least 1 year prior to the filing of the petition, as required by Neb. Rev. Stat. § 42-349 (Reissue 1988), and that she signed the voluntary appearance based on promises by the appellant that he would not seek custody of the child. After an evidentiary hearing was held on August 10, the court granted the appellee's motion, finding that the parties were domiciled in Texas during May 1988. The court also opined that "perhaps the decree . . . was obtained improperly." The appellant perfected an appeal to this court.

On appeal, the appellant argues that the trial court (1) abused its discretion in vacating the decrees, (2) erred in finding that he was domiciled in Texas, and (3) erred in finding that he obtained the default decree by fraud. We do not reach these assignments of error, however. Instead, we sustain the decision vacating the decrees, based upon the trial court's lack of jurisdiction to enter them.

Neb. Rev. Stat. § 42-363 (Reissue 1988) provides in part that "[n]o suit for divorce shall be heard or tried until sixty days after perfection of service of process, at which time the suit may be heard or tried and a decree may be entered." In *Garrett v. State*, 118 Neb. 373, 224 N.W. 860 (1929), this court held that

the waiting period for obtaining a divorce is a jurisdictional requirement. See Comp. Stat. § 42-305 (1929) ("no suit for divorce shall be heard or tried for a period of six (6) months after service has been had or perfected") (repealed by 1933 Neb. Laws, ch. 50, § 2, p. 267). In that case, the wife perfected service of summons on October 19, 1926, and the divorce hearing was held on April 19, 1927. The trial court filed its decree 2 days later. On appeal, this court held that when a certain period of time must elapse before a court is vested with the power to act, "the rule is to exclude the first day and include the whole of the last in said period." *Garrett, supra* at 376, 224 N.W. at 861. Applying this rule, the court concluded that the 6-month period did not end until midnight on April 19, 1927, and thus the trial court's action in hearing, trying, and deciding the case on that date was without jurisdiction and a nullity.

Here, the 60-day period prescribed in § 42-363 began to run on March 13, 1989, the date the appellee filed her voluntary appearance. See Neb. Rev. Stat. § 25-516.01(1) (Reissue 1989) (the voluntary appearance of a party is equivalent to service of process). Under the rule established in *Garrett*, the trial court lacked jurisdiction to hear the case or enter a decree until midnight on May 12, 1989. Therefore, the May 10 hearing and the May 11 decree are null and void. The only remaining question is whether the May 19 decree is invalid as well.

Section 42-363 prohibits *hearing* the case within the prescribed period as well as entering the decree. Logic dictates that a divorce decree based upon evidence adduced at a null and void hearing is itself a nullity, even if it is entered after expiration of the waiting period. See, *Garrett, supra*; *Feuquay v. Industrial Commission*, 107 Colo. 336, 111 P.2d 901 (1941); *Pavell v. Pavell*, 168 S.W.2d 288 (Tex. Civ. App. 1942) (Combs, J., concurring).

The record in this case reveals that the May 19 decree is based upon findings made at the May 10 hearing. Though the May 19 decree states that a hearing was held and evidence was adduced on that date, the trial court's journal entries for May 10 and May 19 clearly reveal that no such hearing occurred. This conclusion is bolstered by the appellant's characterization of the May 19 decree as an "order nunc pro tunc" intended merely

to correct the original decree to accurately reflect the court's findings. We conclude that the trial court relied on the May 10 hearing in issuing its May 19 decree and therefore the latter is a nullity.

The appellee first questioned the trial court's power to enter the decrees during oral argument before this court. However, it is settled that either party may raise the jurisdictional issue at any time. *Anthony v. Pre-Fab Transit Co., ante* p. 404, 476 N.W.2d 559 (1991). Moreover, when the record indicates that the decision of the trial court is correct, although for reasons different from those relied upon below, an appellate court will affirm the trial court's decision. See *Weimer v. Amen*, 235 Neb. 287, 455 N.W.2d 145 (1990). Thus, we affirm the trial court's decision vacating the May 11 and May 19 decrees, on the basis that the trial court lacked jurisdiction to enter them.

AFFIRMED.

CAPORALE, J., not participating.

STATE OF NEBRASKA, APPELLEE, V. RUSSELL DETHLEFS, ALSO KNOWN AS RUSSEL DETHLEFS, APPELLANT.

479 N.W.2d 780

Filed February 7, 1992. No. 90-1083.

Sentences. The most practical rationale underlying allocution is that it provides an opportunity for the offender and defense counsel to contest any disputed factual basis for the sentence.

Appeal from the District Court for Hall County: WILLIAM H. RILEY, Judge. Affirmed.

John S. Mingus, of Mingus & Mingus, for appellant.

Susan M. Koenig, Deputy Hall County Attorney, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

Russell Dethlefs appeals his sentences after pleading guilty to one count of distribution of a controlled substance (cocaine), a Class II felony, punishable by 1 to 50 years' imprisonment, and one count of distribution of a controlled substance (marijuana), a Class III felony, punishable by 1 to 20 years' imprisonment, a $25,000 fine, or both. Dethlefs was sentenced to concurrent terms of 18 to 24 months' imprisonment on the first count and 1 year's imprisonment on the second count.

Dethlefs alleges, in summary, that the district court erred in (1) not soliciting a proper allocution, i.e., the court did not specifically ask Dethlefs prior to sentencing whether he had anything to say as to why judgment should not be passed upon him; (2) considering a presentence investigation report that stated Dethlefs was not a good candidate for probation because probation would depreciate the seriousness of the offense and that did not have or take into consideration a psychiatric evaluation of Dethlefs; and (3) failing to grant probation and administering excessive sentences.

As the basis for his appeal, appellant first alleges a judicial violation of Neb. Rev. Stat. § 29-2201 (Reissue 1989), which requires that prior to sentencing, defendant "be informed by the court of the verdict . . . and asked whether he has anything to say why judgment should not be passed against him."

The record reflects that the court received Dethlefs' guilty pleas and the following exchange transpired:

> THE COURT: Mr. Dethlefs, this is your opportunity to say anything to me, sir, that you'd like to say. I'd like to hear from you.
>
> . . . .
>
> MR. DETHLEFS: — I ask that you recognize that I haven't been in trouble lately for — since before the arrest, and I'd like to be able to work and support my family.

As we have previously stated, " ' "Today the most practical rationale underlying allocution is that it provides an opportunity for the offender and defense counsel to contest any disputed factual basis for the sentence . . . ." ' " *State v. Bunner*, 234 Neb. 879, 890, 453 N.W.2d 97, 103 (1990), quoting A. Campbell, Law of Sentencing § 72 (1978). We find that an

opportunity was afforded the appellant to offer comments why judgment should not be passed upon him. The judge complied with the intent of the statute, and the statute does not require that the specific words set out in the statute be used. The assignment is without merit.

Secondly, appellant alleges that the court erred both in considering a presentence investigation report that stated appellant was not a good candidate for probation because probation would depreciate the seriousness of the offense and in failing to consider a psychiatric evaluation of the appellant. Both of these contentions are without merit.

As a matter of law, no defendant, once convicted, is entitled to be placed on probation. *State v. Johnson*, 209 Neb. 308, 307 N.W.2d 525 (1981). Such a decision is a matter of discretion for the trial court, and unless the defendant demonstrates an abuse of discretion, this court will not overturn a sentence. See *State v. Swails*, 195 Neb. 406, 238 N.W.2d 246 (1976). Despite the fact that these offenses resulted in the appellant's first felony convictions, we find no abuse of discretion in the court's failure to grant probation.

Dethlefs asserts that according to Neb. Rev. Stat. § 29-2261(5) (Reissue 1989), the court "may order the offender to submit to psychiatric observation and examination" and that "may" should be interpreted as "must," or "shall," imposing a statutory duty upon the trial court. While we are cognizant that in many instances the assertion is true, closer examination of the statute reveals that, to paraphrase, only where psychiatric observation and examination have been conducted *shall* such a report be submitted to the court. It is evident to us that the Legislature clearly intended a distinction to be drawn when it used both "may" and "shall" in the same statutory provision. Dethlefs has no inherent right to a psychiatric evaluation, and we find no abuse of discretion in the court's failure to order a psychiatric evaluation.

Finally, appellant asserts that the sentences imposed were excessive. "[T]he imposition of a sentence within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion." *State v. Morley, ante* p. 141, 156, 474 N.W.2d 660, 670 (1991).

Dethlefs was sentenced to terms of 18 to 24 months' imprisonment on the first count and 1 year on the second count. The appellant's sentences are well within the statutory limits, and we find no abuse of discretion. The judgment below is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RANDY E. WEGENER, APPELLANT.

479 N.W.2d 783

Filed February 7, 1992. No. 90-1115.

1. **Police Officers and Sheriffs: Arrests: Probable Cause.** The existence of probable cause justifying a warrantless arrest is tested by the collective information possessed by all the officers engaged in a common investigation.
2. _____: _____: _____. An officer who does not have personal knowledge of any of the facts establishing probable cause for an arrest may nevertheless make the arrest if the arresting officer is merely carrying out directions of another officer who does have probable cause.
3. **Arrests: Evidence.** Although the diminishment over time and the ultimate elimination of alcohol in the bloodstream are not willful or intentional, this metabolic process constitutes the destruction of evidence such as to provide a basis for effecting a warrantless arrest under the provisions of Neb. Rev. Stat. § 29-404.02 (Reissue 1989).
4. **Criminal Law: Motions to Dismiss: Evidence.** On a criminal defendant's motion to dismiss for insufficient evidence, the State is entitled to have all its relevant evidence accepted as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor.
5. **Criminal Law: Directed Verdict.** In a criminal case, a trial court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged, or the evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained.

Appeal from the District Court for Thayer County, ORVILLE L. COADY, Judge, on appeal thereto from the County Court for Thayer County, DANIEL BRYAN, JR., Judge. Judgment of District Court affirmed.

Joseph H. Murray, of Germer, Murray & Johnson, for appellant.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

CAPORALE, J.

Defendant, Randy E. Wegener, asserts the district court erred in affirming his county court conviction of driving while under the influence of alcohol, in violation of Neb. Rev. Stat. § 39-669.07 (Reissue 1988). More specifically, he asserts that the district court erred in failing to find the county court erred on the record by (1) admitting into evidence the results of a test of his blood and (2) failing to dismiss the case at the close of the plaintiff-appellee State's case. We affirm.

Shortly before midnight on October 8, 1989, Officer David Lee of the Thayer County Sheriff's Department was dispatched to the scene of a one-vehicle accident. He there found a station wagon which had collided with a bridge guardrail. The wagon was stopped on the shoulder of the road, and Wegener, bleeding from his nose and from a cut over his left eye, was standing beside the wagon.

Lee detected a strong odor of alcohol on Wegener's breath and thus suspected, even before the two engaged in conversation, that Wegener had been drinking. Upon inquiry, Wegener said he had been driving, had been alone in the wagon, and had been drinking. Although Lee had difficulty understanding Wegener, Lee administered no field sobriety tests, as he could not be certain the difficulty was not the result of Wegener's injuries. Thus, Wegener was transported by rescue unit to a hospital while Lee remained at the scene to complete his investigation.

In the course of his work, Lee discovered some beer bottles in the wagon. Three were full, one was empty, and the others had been shattered. Lee could not tell whether the shattered bottles had been full or empty when they broke, but three of the other bottles were still cold.

The presence of the beer, combined with the other information he had acquired, led Lee to believe that Wegener had been driving while under the influence of alcohol. Lee thus

radioed the dispatcher to report a possible drunk driver, and requested that an officer go to the hospital to which Wegener was being transported and obtain a blood sample from him.

Deputy Kenneth Cool then went to the hospital and awaited Wegener's arrival. After Wegener had been treated for his injuries, Cool placed Wegener under arrest. Cool then read to Wegener an implied consent form which is not contained in the record. Wegener signed the document, and Cool thereafter, approximately an hour and a half after the accident had taken place, caused a sample of Wegener's blood to be drawn. (Neb. Rev. Stat. § 39-669.08 (Reissue 1988) provides that one arrested for acts allegedly committed while driving under the influence of alcohol may be required to submit to a blood test.)

Cool, observing that some masking odors may have been present in the room, detected no odor of alcohol when standing approximately 4 to 5 feet from Wegener while reading the implied consent form; he did, however, smell alcohol on Wegener's breath when Wegener was placed in the squad car after the blood sample had been drawn. As Cool was acting on the basis of a radio message, he did not closely observe Wegener before placing him under arrest. Nor did Cool engage Wegener in any casual conversation, and nothing was said as to Wegener's drinking or driving. Cool did notice, however, that Wegener was coherent and in some pain and that he joked with the nurses.

Prior to trial, Wegener filed a motion to suppress the blood test results on the grounds that there was no probable cause to either arrest him or require him to provide a blood sample and that any statements he made were obtained unconstitutionally. Following a hearing, at which the above evidence was presented, the motion was overruled.

In addition to the foregoing evidence, the jury heard that the accident occurred on a flat stretch of highway, the guardrail Wegener struck was 5½ feet from the white shoulder line of the road, Lee found no skid marks, and there was severe damage to the front of the wagon on the passenger side.

Further, a member of the rescue unit team testified that he did not detect any alcohol odor while riding with Wegener, but thought he had detected such an odor when bandaging him.

This worker also stated that while at the accident scene, Wegener "talked probably a little louder than normal." Another member of the rescue unit also characterized Wegener as loud and rambling, but admitted he had not known Wegener previously and thus was not familiar with Wegener's normal speech.

Wegener objected to the receipt into evidence of the blood test results by renewing his earlier motion to suppress that evidence. After the objection was overruled, a laboratory technician testified that Wegener's blood alcohol content was .182 gram per one hundred milliliters.

At the close of the State's case, Wegener moved for dismissal on the ground that the evidence was insufficient to support a conviction. Upon the overruling of that motion, Wegener rested without adducing any evidence.

With respect to the first assignment of error, Wegener asserts the warrantless arrest was unconstitutional because Cool, as the arresting officer, had made no independent probable cause determination.

The existence of probable cause justifying a warrantless arrest, however, is tested by the collective information possessed by all the officers engaged in a common investigation. See, *State v. Halligan*, 222 Neb. 866, 387 N.W.2d 698 (1986), quoting *State v. Klingelhoefer*, 222 Neb. 219, 382 N.W.2d 366 (1986); *State v. Nowicki*, 209 Neb. 640, 309 N.W.2d 89 (1981). See, also, *U.S. v. Bertrand*, 926 F.2d 838 (9th Cir. 1991); *Dykhouse v. Mugge*, 735 F. Supp. 1377 (C.D. Ill. 1990); *U.S. v. Hoyos*, 892 F.2d 1387 (9th Cir. 1989); *United States v. Webster*, 750 F.2d 307 (5th Cir. 1984); *United States v. Bernard*, 607 F.2d 1257 (9th Cir. 1979); *Poindexter v. Wolff*, 403 F. Supp. 723 (D. Neb. 1975) (it is the collective knowledge of the police force and not just the personal knowledge of the arresting officers that is to be used to test the sufficiency of probable cause).

Under this "collective knowledge" doctrine, an officer who does not have personal knowledge of any of the facts establishing probable cause for the arrest may nevertheless make the arrest if the arresting officer is merely carrying out directions of another officer who does have probable cause.

Charles v. Smith, 894 F.2d 718 (5th Cir. 1990).

Therefore, the question is whether the information available to the sheriff's department at the time of the arrest was such that a reasonably prudent person would believe that Wegener had driven while under the influence of alcohol. The defendant in *State v. Halligan, supra*, had been involved in a one-vehicle accident and was transported to the hospital. His breath smelled of alcohol, there were three full cans of beer in the vehicle, his eyes were bloodshot, and his speech was slow and slurred, but he was responsive to questions. A nurse testified that the defendant admitted he had had one too many beers, and there was testimony that he had behaved in a sexually aggressive manner toward the nurse. This court found such evidence not only sufficient to establish probable cause to arrest without a warrant, but also sufficient to convict.

Here, Lee, who made the request that the blood sample be taken, knew that Wegener had been drinking and had driven several feet off a straight stretch of highway and collided with a guardrail. Lee also knew that Wegener produced a strong odor of alcohol and that his speech seemed hampered. Moreover, at least one empty and three full bottles of beer were on the floor on the passenger side in the vehicle. Under these circumstances, only an imprudent person could conclude other than that Wegener probably had been driving while under the influence of alcohol.

Neb. Rev. Stat. § 29-404.02 (Reissue 1989) authorizes peace officers such as Lee and Cool to make a warrantless arrest when there is reasonable cause to believe that the person to be arrested has committed a misdemeanor and where

> the officer has reasonable cause to believe that such person either (a) will not be apprehended unless immediately arrested, (b) may cause injury to himself or herself or others or damage to property unless immediately arrested, (c) may destroy or conceal evidence of the commission of such misdemeanor, or (d) has committed a misdemeanor in the presence of the officer
>
> . . . .

Wegener alleges that as none of these criteria were present in this case, Cool was not authorized to make a warrantless arrest;

therefore, the blood test was obtained as the result of an illegal arrest.

However, Lee testified he was aware of the body's ability to metabolize alcohol. Although the diminishment over time and the ultimate elimination of alcohol in the bloodstream are not willful or intentional, this metabolic process nonetheless constitutes the destruction of evidence such as to provide a basis for effecting a warrantless arrest under the provisions of § 29-404.02. As noted in *State v. Marcotte*, 233 Neb. 533, 539, 446 N.W.2d 228, 233 (1989), citing *State v. Bishop*, 224 Neb. 522, 399 N.W.2d 271 (1987), "because evidence of a defendant's intoxication would be lost if the police had to wait to obtain a search warrant, a warrantless arrest is valid." See, also, *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) (warrantless seizure of a blood sample from a suspected drunk driver appropriate because delay attendant to obtaining a warrant threatened the destruction of evidence due to the diminishment of the alcohol in the blood).

Wegener contends that his case is distinguishable from *Marcotte* because Lee and Cool testified that they did not feel the immediate arrest of Wegener was necessary to prevent the destruction or concealing of evidence. However, the jury could have found this testimony related to the intentional manipulation of the evidence, such as Wegener removing his vehicle or disposing of the beer bottles found at the scene.

In his second and last assignment of error, Wegener claims it was error to overrule his motion to dismiss. On a criminal defendant's motion to dismiss for insufficient evidence, the State is entitled to have all its relevant evidence accepted as true, the benefit of every inference reasonably drawn from the evidence, and every controverted fact resolved in its favor. *State v. Pierce*, 231 Neb. 966, 439 N.W.2d 435 (1989). In a criminal case, a trial court can direct a verdict only when there is a complete failure of evidence to establish an essential element of the crime charged, or the evidence is so doubtful in character and lacking in probative value that a finding of guilt based on such evidence cannot be sustained. *State v. Morley, ante* p. 141, 474 N.W.2d 660 (1991).

The evidence outlined earlier is more than enough to make

the issue of whether Wegener drove while under the influence of alcohol one of fact to be resolved by the jury.

There being no merit to either of Wegener's assignments of error, the judgment of the district court is affirmed.

AFFIRMED.

IN RE INTEREST OF B.B., K.M., J.M., AND A.M., CHILDREN UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. S.M., APPELLANT.

479 N.W.2d 787

Filed February 7, 1992. Nos. 91-137, 91-138, 91-139, 91-140.

1. **Parental Rights: Appeal and Error.** Our review in termination of parental rights cases is de novo on the record, and we are required to reach a conclusion independent of the trial court's findings; however, where the evidence is conflicting, we consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another.
2. **Parental Rights: Proof.** A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent with the child is an independent reason to justify termination of parental rights.
3. **Parental Rights.** When a parent is unable or unwilling to rehabilitate herself within a reasonable period of time, the best interests of the child require termination of parental rights.

Appeal from the County Court for York County: CURTIS H. EVANS, Judge. Affirmed.

Kevin V. Schlender for appellant.

Charles W. Campbell, York County Attorney, for appellee.

George E. Brugh, guardian ad litem.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

These four cases are appeals from the January 24, 1991, orders terminating the parental rights of the appellant and her

husband to the following children: B.B., born January 16, 1982; K.M., born September 8, 1983; J.M., born January 27, 1985; and A.M., born June 27, 1986. The cases have been consolidated for briefing and argument in this court.

Although the mother of the children, her husband, and the intervenor, B.T., filed separate notices of appeal, only the mother, the county attorney, and the guardian ad litem filed briefs in this court.

B.B., K.M., and A.M. came to the attention of the Nebraska Department of Social Services (DSS) in November 1987, when the appellant took them into the York DSS office, alleging abuse of the children by her husband. In February 1988, those three children were adjudicated to be within the meaning of Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988) because they were in a situation dangerous to life or limb. J.M. was brought to the court's attention when the appellant was evicted from her residence. On March 31, 1988, J.M. was adjudicated to be within the meaning of § 43-247(3)(a) in that he was homeless or destitute.

The children remained in the physical possession of the appellant and her husband until September 1989, when they were placed in foster homes because of concerns about the parents moving and the disruption it would cause the children. All four children have been in the same foster home since March 12, 1990, and have done very well with that family. The foster parents have expressed their desire to adopt all of the children.

The court entered orders, from time to time, directing the parents to participate in counseling designed to stabilize their marriage and teach them appropriate parenting skills and to eliminate the physical and sexual abuse to which the children had been exposed. The court also ordered the parents to provide adequate food, shelter, clothing, and medical care for the children; to give the children adequate supervision in the home; to maintain the home in a clean and safe condition; to not allow B.T. to remain in their home, stay in their home at any time, have access to their home, or have access to any of their children; and to cooperate with DSS personnel.

Supplemental petitions to terminate the parental rights of the

appellant and her husband were filed on September 24, 1990.

Hearings on the supplemental petitions to terminate parental rights were held on January 3 and 4, 1991. On January 24, 1991, the court terminated the parental rights of the appellant and her husband to all four children.

The mother assigned as error the court's findings that the State established by clear and convincing evidence that the appellant substantially, continuously, and repeatedly neglected the minors and refused to give them necessary parental care and protection; that the appellant failed, after reasonable efforts under the direction of the court, to correct conditions leading to the determination made by the court that the minors were children as defined by § 43-247(3)(a); and that it was in the best interests of the minors to terminate the appellant's parental rights to them.

We review the records in these cases de novo and are required to reach a conclusion independent of the trial court's findings; however, where the evidence is conflicting, we consider and may give weight to the fact that the trial court observed the witnesses and accepted one version of the facts over another. *In re Interest of B.M., ante* p. 292, 475 N.W.2d 909 (1991).

Throughout their involvement with DSS, the parents' continued marital status has been in question. Attempts to improve the marital situation were met with resistance by the parents, who exhibited a general lack of compliance with recommendations given to them by the therapists who saw them. The parents were inconsistent in making and keeping appointments with their various counselors.

The appellant expressed fear of her husband on numerous occasions. However, when she was offered protection, she elected to remain with her husband.

Assistance from family support workers and a caseworker was met with resistance. On several occasions the family home was found to be unclean and unsafe for the children. Medical attention was not sought for the children except in extreme emergencies. In extremely cold weather, the children were sent to school in inappropriate clothing.

After the children were placed in foster care, the parents lived in an efficiency apartment which was too small for the family.

The parents later located a trailer, which on an unannounced visit was found to be very unclean.

The children's behavior is consistent with that of children who have been physically and sexually abused. They reported to their counselors that they had been beaten by their parents.

B.B. was forced to watch his parents engage in sexual relations, and he told a counselor that he had seen his parents watch pornographic movies. J.M. also reported that he had seen his parents having sex. The appellant admitted that she and her husband had had sex in front of the children.

K.M. reported that she had been sexually molested. The appellant and her husband were not supportive of K.M.'s participation in therapy while she was in their possession. Therapy with one counselor for K.M.'s sexual abuse was discontinued by the parents.

At times, K.M. accused her father of the abuse, and at other times she accused B.T. Apparently, depending on whether the appellant was living with B.T. or her husband, at some times K.M. was told to say that the abuser was B.T., and at other times she was told to say that she had been abused by her father.

Both the appellant and B.T. claim that B.T. is the biological father of J.M. and A.M. Although the appellant was ordered to disassociate herself from B.T., she continued her relationship with him during the times when she was separated from her husband and also while she was living with her husband.

A mental health therapist testified to having concerns regarding the appellant's inability to protect her children from abuse. It was also the opinion of several counselors that the appellant was incapable of parenting her children. At one time, the appellant admitted to a psychologist that she was not capable of parenting her children.

All of the children expressed a desire not to visit with their parents. They would get sick during and after visits with their parents.

The appellant contends the trial court erred in finding she had substantially, continuously, and repeatedly neglected the minors and refused to give them necessary parental care and protection, because she had participated in counseling, attended parenting classes, and tried to implement the

techniques she learned. She claims the primary problem in the case was the abuse that the children were subjected to by their father and his refusal to change his parenting style.

The evidence shows that the appellant failed to protect her children from her husband and B.T., both of whom she had reported as having physically and/or sexually abused her children. Although the appellant repeatedly claimed that her husband was responsible for abusing her children, she continued to reside with him at various intervals, so as to subject herself and her children to that abusive environment. Likewise, she claimed at various times that B.T. was abusive, and yet even though she was ordered by the court to have no contact with him, she continued to reside with him whenever she was separated from her husband. At the time of the termination hearing, the appellant testified that she wanted the court to allow her children to bond with her, her husband, and B.T.

A psychologist who had treated the appellant noted that she lacked insight as to the trauma the children had suffered as a result of the abuse and that she lacked the motivation to protect them from further abuse. Because of her lack of insight and ambivalence regarding her husband's behavior, the appellant was unable to place the needs of her children above her own wants and needs. The appellant's indecisiveness regarding her relationships with her husband and B.T. seriously jeopardized the health and well-being of her children.

Because of the appellant's lack of insight and her lack of motivation to place the interests of her children ahead of her own, the court did not err in finding there was clear and convincing evidence to establish that the appellant had substantially, continuously, and repeatedly neglected her children and had refused to give them the necessary parental care and protection.

The appellant argues that the trial court was incorrect in finding she had failed to comply with court orders designed to correct the conditions which had led to the initial adjudication of the children, because she had attempted to comply with the court orders and DSS had failed to follow through with the recommendations of the psychologists. The record does not

support this contention.

B.B., K.M., and A.M. were adjudicated based upon the abuse that they had suffered from their father and the mother's failure to protect them from this abuse. J.M. was adjudicated when he was found to be in a situation in which the appellant lacked the ability to provide for his fundamental needs of shelter, food, and medical care.

To correct this situation, the court made various orders directing the parents to participate in counseling designed to stabilize their marriage, teach them appropriate parenting techniques, and eliminate the abuse that was a constant in their lives. The parents were also ordered to preclude contact with B.T.; to maintain safe, clean, and adequate housing; and to cooperate with DSS.

Intensive counseling and a variety of services were provided to the appellant to implement the court's plan for rehabilitation. Because of the appellant's various moves from community to community, the services being provided to the family were interrupted, which prevented the children from receiving necessary therapy, including any family therapy recommended by the various professionals.

During the entire course of the court's involvement with the case, the appellant lived with either her husband or B.T. At different times she accused both her husband and B.T. of abusing her children. The appellant has shown by her actions and her testimony that she lacks the insight and motivation to make the necessary changes to put the needs of her children ahead of her own.

" 'A parent's failure to make reasonable efforts to comply with a court-ordered plan of rehabilitation designed to reunite the parent with the child is an independent reason to justify termination of parental rights . . . .' " *In re Interest of B.M., ante* p. 292, 298-99, 475 N.W.2d 909, 913 (1991).

While the appellant may have complied with some parts of the court-ordered plans for rehabilitation, she failed to correct the conditions which led to the initial adjudication of the children. " 'The fact of participation in certain elements of the court-ordered plan of reunification does not necessarily prevent the court from entering an order of termination where

the parent has not made satisfactory progress toward reunification.' " *In re Interest of B.M., supra* at 300, 475 N.W.2d at 914, quoting *In re Interest of A.M.Y., F.E.Y., and K.C.Y.*, 237 Neb. 414, 466 N.W.2d 93 (1991).

Finally, the appellant argues that the court erred by finding there was clear and convincing evidence to establish that it was in the best interests of the children to terminate her parental rights.

Testimony from the DSS family support worker who supervised visits between the appellant and the children, from a therapist, and from one of the foster parents showed that the children feared their parents and wanted to have no further contact or visitation with them. The children have done well in the care of the foster family that is willing to adopt them.

The appellant has never demonstrated an ability to provide an environment for the children free from abuse. She has been unable to make the necessary changes which would enable her to adequately parent her children in a loving and safe home.

" '[W]hen a parent is unable or unwilling to rehabilitate herself within a reasonable period of time, the best interests of the child require termination of parental rights.' " *In re Interest of B.M., supra* at 299, 475 N.W.2d at 913.

The judgment in each of the cases is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. MICHAEL J. KNIGHT, APPELLANT.

479 N.W.2d 792

Filed February 7, 1992. No. 91-186.

Conspiracy: Convictions: Proof. To sustain a conviction of conspiracy, proof is required that the accused agreed with one or more persons that they or one or more of them would engage in or solicit the conduct or would cause or solicit the result specified by the definition of the offense, and that the accused or another person with whom he conspired committed an overt act in pursuance of the conspiracy.

Appeal from the District Court for Lancaster County: PAUL D. MERRITT, JR., Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, and Robert G. Hays for appellant.

Michael J. Knight, pro se.

Don Stenberg, Attorney General, and Mark D. Starr for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

Appellant, Michael J. Knight, was convicted of conspiracy to commit first degree murder, under Neb. Rev. Stat. §§ 28-202 and 28-303 (Reissue 1989), a Class II felony, which carries a statutory penalty of 1 to 50 years' imprisonment. Appellant was sentenced to an indeterminate term of 10 to 15 years' imprisonment and ordered to pay the costs of prosecution, and he was granted credit for 253 days already served.

Laurie Loper had lived with appellant for 4 or 5 months during an 11-month period in which she was separated from her husband, Kevin. Two months after appellant had moved out of Laurie Loper's home, her husband moved into that same apartment.

Mickey Koss testified at trial that he and Knight had met in the penitentiary and had known each other for 2 years. He claimed that in May 1990, he and Knight were both housed in the "trusty dorm" of the Lancaster County jail, in which dorm inmates have 24-hour access to a telephone.

According to Koss' testimony, Knight had discussed with him that he was still in love with Laurie Loper, but that her husband would soon be released from the penitentiary and reuniting with her. Koss testified that Knight was furious about losing Laurie Loper to her husband.

Knight asked Koss to assist him in "having Mr. Loper's legs broken." Later, Knight told Koss that he wanted Kevin Loper "offed" and asked whether Koss knew anyone who might do that. Koss responded that he might.

Koss called Charlie Daniels of the Lincoln Police Department and explained to him what had been transpiring. Officer Daniels met with Koss and learned from him that Knight wanted Kevin Loper offed and that Knight wanted the key to the dead bolt to the Lopers' apartment retrieved.

The following day, Koss told Knight that he had found a person named "Bill" to take care of Knight's problem and that Koss was to call Bill between 5 and 5:30 p.m. that evening. Koss testified that it had been his understanding that the person named "Bill" would be a police officer. Knight was agreeable with the plan and wanted Koss "to go through with the plan."

Koss placed the phone call shortly after 5:30 p.m. Once he had reached the person who identified himself as Bill, Koss handed the telephone over to Knight.

After his telephone conversation with Bill, Knight asked Koss to loan him $500 to pay Bill, and Knight also talked about paying Bill off in drugs. Later that evening, a note was brought to Knight which stated that there was an emergency at home and that he was to call a particular number. Koss had overheard Knight tell Bill to use this method to contact Knight. Knight requested that Koss dial the number; then Knight engaged in another telephone conversation for 10 to 15 minutes. Following this conversation, Knight asked Koss if the person on the phone was reliable. Koss assured Knight that he was. Koss left the jail the following day when the Lincoln Police Department posted his $50 bond.

Det. Sgt. Gregory Sorensen testified that on May 14, 1990, he was assigned to portray a hired killer and talked to Knight by telephone about killing Kevin Loper. At approximately 5:30 p.m., Sorensen received a phone call from a person who identified himself as Mick, and subsequently, a 20-minute tape-recorded conversation ensued with Knight. This tape was played to the jury.

Sorensen set up a second recorded telephone conversation by calling the jail and leaving a number for Knight to call. A few minutes later a person identifying himself as Mick returned the call. After speaking with Mick, Sorensen had another telephone conversation with Knight. In this conversation, which lasted 10 to 15 minutes, Sorensen and Knight discussed

the murder plans. The next day, in a third recorded phone conversation, Sorensen told Knight that he had everything set up for the murder. Sorensen discussed how he was to be paid and how he intended to deliver Kevin Loper's keys to Knight. These two recorded conversations were also played to the jury.

Knight alleges in what we have summarized as eight assignments of error that the district court abused its discretion by (1) overruling his plea in abatement, (2) overruling his demurrer, (3) sustaining the State's objection to his cross-examination of Koss regarding Koss' attempts to avoid incarceration, (4) overruling his motion to dismiss at the close of the State's case, (5) overruling his motion for directed verdict at the close of the evidence, (6) sustaining a verdict that was not supported by sufficient evidence and was contrary to law, (7) imposing a sentence that was excessive and disproportionate to the severity of the offense when considered with his background and prior record, and (8) overruling his motion for a new trial.

Appellant did not argue the first, second, and eighth assignments of error, and we consider them no further. See *In re Interest of P.M.C.*, 231 Neb. 701, 437 N.W.2d 786 (1989). Neb. Ct. R. of Prac. 9D(1)d (rev. 1991) states that "consideration of the case will be limited to errors assigned *and* discussed." (Emphasis supplied.)

Appellant's third assignment of error addresses the court's failure to allow him to cross-examine Koss on Koss' desires and attempts to get out of jail or on Koss' motivations for initiating police involvement and continuing his cooperation. While normally it is appropriate and expected to allow cross-examination of a witness on biases and motivations for testifying against a party, the court may preclude such from entering into evidence if its probative value is outweighed by its prejudicial effect, marginal relevance, or its potential for fostering confusion of issues for the jury. *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). No evidence existed to cast either a valid entrapment defense or an argument that Koss had enticed the appellant into the conspiracy. The court did not err in the exclusion of the cross-examination of Koss on these issues.

The fourth, fifth, and sixth assignments of error question the sufficiency of the evidence to overrule appellant's motion to dismiss and his motion for directed verdict and to sustain his conviction. We find that the evidence was sufficient and affirm the district court's determinations.

With Nebraska's adoption of § 28-202, there came a shift from a bilateral approach to conspiracy to a unilateral approach. Where we once required for conviction of conspiracy "a meeting of the minds," or joint intent, we now require only that the accused

> agrees with one or more persons that they or one or more of them shall engage in or solicit the conduct or shall cause or solicit the result specified by the definition of the offense; and (b) He or another person with whom he conspired commits an overt act in pursuance of the conspiracy.

§ 28-202(1). Under the present scheme, which follows the Model Penal Code's interpretation of conspiracy, the fact that none of the "coconspirators" at any time planned to follow through with the plan has no impact on the culpability of the appellant.

The testimony that appellant initiated conversations about "offing" Kevin Loper and his participation in three telephone conversations with "Bill" about his plan and specific instructions to assist in bringing the plan to fruition provide sufficient evidence of overt acts to sustain the conspiracy conviction.

Finally, appellant asserts that the sentence imposed was excessive. "[T]he imposition of a sentence within the statutorily prescribed limits will not be disturbed on appeal absent an abuse of discretion." *State v. Morley, ante* p. 141, 156, 474 N.W.2d 660, 670 (1991). Appellant's sentence is well within the statutory limits. Conspiracy to commit murder is a Class II felony. See §§ 28-202(4) and 28-303. A minimum of 1 year's imprisonment and a maximum of 50 years' imprisonment is authorized for this class of offense. Neb. Rev. Stat. § 28-105 (Reissue 1989).

Appellant's contention that the seriousness of his offense did not warrant the 10- to 15-year indeterminate sentence imposed

upon him is without merit. Appellant conspired to commit murder while in jail on another charge and was unsuccessful in his conspiracy only because he was unwise in his choice of a coconspirator. Koss testified that the appellant had told him that if he ever "needed anything or anybody taken care of, that [Knight] would do that" for Koss if Koss would come up with the money to pay off the hit man who was to kill Kevin Loper.

We are convinced that the appellant's crime is sufficiently serious to warrant the sentence received, which is well within the statutory limits. We find no abuse of discretion, and accordingly, we affirm the judgment in its entirety.

AFFIRMED.

STATE OF NEBRASKA EX REL. NEBRASKA STATE BAR ASSOCIATION, RELATOR, V. DONALD W. WININGHAM, RESPONDENT.

479 N.W.2d 467

Filed February 7, 1992. No. 91-916.

Original action. Judgment of disbarment.

HASTINGS, C.J., BOSLAUGH, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Three disciplinary complaints were filed with the Counsel for Discipline of the Nebraska State Bar Association against Donald W. Wininghamm.

To protect the public and the reputation of the bar, this court temporarily suspended respondent on October 7, 1991, pending investigation of the complaints against him.

On November 25, 1991, formal charges were filed against the respondent, setting forth three counts alleging violations of the following provisions of the Code of Professional Responsibility: DR 1-102(A)(1) and (6), DR 6-101(A)(3), and DR 7-101(A)(2). Respondent was also charged with two counts of violating DR 1-102(A)(5) and DR 9-102(B)(4). On November

26, more charges were filed against respondent, supplementing the original charges with three additional counts for violations of DR 1-102(A)(1) and (6), DR 6-101(A)(3), and DR 7-101(A)(2).

Respondent has failed to file an answer to either the initial formal charges or the additional formal charges. Pursuant to Neb. Ct. R. of Discipline 10(I) (rev. 1989), we enter our judgment on the pleadings.

Accordingly, the respondent is hereby disbarred from the practice of law in the State of Nebraska, effective immediately.

JUDGMENT OF DISBARMENT.

WHITE, J., not participating.

DAVID M. HAYES, APPELLEE, V. EQUINE EQUITIES, INC., APPELLANT, AND JOHN P. CHUDY, APPELLEE.

480 N.W.2d 178

Filed February 14, 1992. No. 89-705.

1. **Contracts: Rescission: Fraud: Time.** The purchaser of a chattel who desires to rescind the contract of sale for fraud must act promptly, and while the rule does not require immediate action on his part after discovery of the grounds warranting rescission, it does require him to act within a reasonable time, taking all of the circumstances into consideration.
2. **Evidence: Appeal and Error.** When the evidence on material questions of fact is in irreconcilable conflict, this court may, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and adopted one version of the facts rather than the other.
3. **Contracts: Rescission: Fraud: Proof.** The party seeking to rescind a contract must allege and prove (1) the material representation of fact that was made, (2) that it was false, (3) that the aggrieved party believed the representation to be true, (4) that he relied and acted upon it, and (5) that he was thereby injured.
4. **Fraud.** A person is justified in relying on a representation made to him or her where the representation is a positive statement of fact and an investigation would be required to discover the truth.
5. _____. While actionable fraud may not be predicated upon sales talk, puffing, or the expression of a mere opinion as to value honestly made under circumstances that do not give another the right to rely thereon, representations of positive facts pertaining to the quality of the thing sold and relied upon by the purchaser, which are calculated to mislead and deceive, if proved false, constitute actionable fraud.

Appeal from the District Court for Douglas County: KEITH HOWARD, Judge. Affirmed in part, and in part reversed and remanded with directions.

Frederick S. Cassman, of Abrahams, Kaslow & Cassman, for appellant.

Reed A. Grandgenett, of Gaines, Mullen, Pansing & Hogan, for appellee Hayes.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ.

BOSLAUGH, J.

This action arose out of a controversy concerning the sale of an interest in a registered quarter horse gelding named "Chocolate Marquis" by the defendant Equine Equities, Inc., to the plaintiff, David M. Hayes. The plaintiff sought to rescind his purchase and recover his cash payment of $22,000, together with his equity in a "trade-in" quarter horse named "Smokeys Gray Too." The trial court found that the defendant John P. Chudy had made fraudulent representations to Hayes and that Hayes was entitled to a rescission of his purchase of Chocolate Marquis, a return of his $22,000 cash payment, and $7,500 cash for Smokeys Gray Too. The court entered judgment against Equine Equities in the total sum of $29,500 and dismissed the action as against Chudy.

Equine Equities has appealed, contending the district court erred (1) in failing to find as a matter of law that Hayes' delay of 21 months before seeking rescission constituted a waiver and barred his right of rescission, (2) in failing to discredit Hayes' testimony, (3) in finding that representations as to cost or value or that there was an interested buyer afforded the basis for rescission, and (4) in awarding Hayes the sum of $7,500, representing Hayes' equity in Smokeys Gray Too.

An action for rescission is equitable in nature and is reviewable by this court de novo on the record. *Haumont v. Security State Bank*, 220 Neb. 809, 374 N.W.2d 2 (1985).

The record shows that defendant Chudy is mainly in the business of designing and building commercial and industrial buildings for sale. He became involved in horses in 1984 when

he acquired the quarter horse stallion named "Smokeys Gray Too" on a debt. Chudy had to find a place to board the horse and was referred to Gary Clow.

In 1985, Chudy acquired a 50-percent interest in the appellant, Equine Equities, a quarter horse breeding business operated by Clow near Elkhorn, Nebraska. According to Chudy, Clow suggested that they form the corporation, with Chudy contributing the stallion and Clow contributing some broodmares as capital.

The plaintiff, Hayes, first met Chudy in 1985 when he purchased an office condominium from Chudy. During their discussions, Hayes expressed an interest in showing horses, and Chudy referred Hayes to Clow. Chudy also introduced Hayes to a former employee, Kathy Jondle. On January 28, 1986, Hayes and Jondle formed H - J Partnership for the purpose of acquiring, owning, and maintaining Smokeys Gray Too. The partnership purchased Smokeys Gray Too from Equine Equities for $25,000, with a cash downpayment of $12,500 and the balance carried on a note. Hayes provided $7,500 and Jondle paid $5,000 of the downpayment.

Early in 1986, Clow negotiated the purchase by Equine Equities of Chocolate Marquis, a registered quarter horse gelding, from the Wachter Ranch in Bismarck, North Dakota. The corporation paid $1,300 for Chocolate Marquis, and Clow told Chudy he purchased Chocolate Marquis for that amount. Clow testified that he did not believe Chocolate Marquis was a good racing prospect and that the value of Chocolate Marquis when purchased by Equine Equities was "a matter of extreme speculation." According to Clow, he and Chudy planned to train Chocolate Marquis as a show horse and then sell him for a profit of about $5,000. Chudy, on the other hand, testified that he and Clow intended to sell Chocolate Marquis for as much as $52,000.

Hayes testified that he first heard about Chocolate Marquis in the first week or two of March 1986. According to Hayes, Chudy told him that Equine Equities purchased Chocolate Marquis and some equipment for $50,000 from a ranch in South Dakota, that he and Chudy could buy Chocolate Marquis from Equine Equities for $50,000, and that Chudy had

a buyer ready to purchase Chocolate Marquis for $75,000. To finance the deal, Hayes was to trade his interest in Smokeys Gray Too and pay $22,000 in cash toward the purchase of Chocolate Marquis. Chudy was going to contribute $22,000 toward the purchase of Chocolate Marquis. Hayes testified that he thought he was buying the horse together with Chudy, that he and Chudy would sell it to Chudy's buyer 2 weeks later for $75,000, and that he and Chudy would split the profits, with Hayes getting 60 percent and Chudy 40 percent of the profits after their investment.

In reality, there was no such purchaser. Hayes testified that he asked Chudy about selling Chocolate Marquis "[c]onstantly for the two weeks so [he] could get [his] money back." According to Hayes, no one came to look at the horse except a former associate of Chudy's, a Mr. Leece from Grand Island. Hayes claims that Leece did not offer to buy Chocolate Marquis. Leece, however, testified that in early April 1986 he offered to pay $35,000 for Chocolate Marquis.

Chocolate Marquis foundered in June or July of 1986 and began limping. Foundering is a condition from which a horse may or may not recover, but the record shows that Chocolate Marquis was not showable after July 1986. A second person offered to buy Chocolate Marquis, for $2,000, in the summer of 1987, after the horse had foundered. At that time, Hayes "realized that the fifty thousand dollar horse that Mr. Chudy and I had purchased was not worth fifty thousand dollars," and demanded his money back from Chudy. At the end of their conversation, Hayes was under the impression that Chudy was going to get some more potential buyers. Employees of the defendant Equine Equities continued to treat Chocolate Marquis' condition, and Hayes pursued the matter of sale with Chudy. However, there were no further inquiries, and Hayes filed this lawsuit in December 1987.

We first consider Equine Equities' contention that Hayes' delay of 21 months before seeking rescission constituted a waiver and barred his right of rescission. In general,

> the purchaser of a chattel who desires to rescind the contract of sale for fraud . . . must act promptly, and while the rule does not require immediate action on his part after

> discovery of the grounds warranting rescission, it does require him to act within a reasonable time, taking all of the circumstances into consideration.

McGuire v. Thompson, 152 Neb. 28, 36-37, 40 N.W.2d 237, 243 (1949). See, also, *Russo v. Williams*, 160 Neb. 564, 71 N.W.2d 131 (1955). The trial court found that Hayes' delay in bringing the action was excused by "1) the continued reassurances by Chudy (not disputed)[;] 2) the later discovery of the horse's true cost to Equine; and 3) the foundering of the horse, which presented a new uncertainty, pending his possible recovery." Taking all of the circumstances into consideration, we conclude Hayes did not waive his right to rescind the contract.

Equine Equities also contends the trial court erred in failing to discredit Hayes' trial testimony because Hayes "materially changed his testimony on vital points in order to meet the necessities of the trial." See, *Momsen v. Nebraska Methodist Hospital*, 210 Neb. 45, 313 N.W.2d 208 (1981); *Sikyta v. Arrow Stage Lines*, 238 Neb. 289, 470 N.W.2d 724 (1991). Hayes' testimony during cross-examination was shown to be inconsistent with portions of his deposition testimony, but the deposition itself is not included in the record.

Despite the demonstrated inconsistencies, the trial judge filed a memorandum specifically stating, "I have no difficulty at all in finding positive misstatements of fact as to the cost to Equine Equities of Chocolate Marquis and the $75,000 buyer waiting in the wings . . . ." We have said that

> [w]hen the evidence on material questions of fact is in irreconcilable conflict, this court will, in determining the weight of the evidence, consider the fact that the trial court observed the witnesses and their manner of testifying and adopted one version of the facts rather than the opposite.

Haumont v. Security State Bank, 220 Neb. 809, 810, 374 N.W.2d 2, 4 (1985). See, also, *Kracl v. Loseke*, 236 Neb. 290, 461 N.W.2d 67 (1990). Having reviewed the record de novo, and being unable to review Hayes' deposition in its entirety, we determine that the inconsistencies complained of are not sufficient to discredit Hayes' testimony as a matter of law.

Equine Equities next contends the district court erred in

finding that Chudy's representations as to cost or value or that there was an interested buyer afforded the basis for rescission. In general, a contract which is voidable because it was induced by fraud may be rescinded. 17A Am. Jur. 2d *Contracts* § 567 (1991); 17A C.J.S. *Contracts* § 418(1) (1963). The party seeking to rescind a contract must allege and prove (1) the material representation of fact that was made, (2) that it was false, (3) that the aggrieved party believed the representation to be true, (4) that he relied and acted upon it, and (5) that he was thereby injured. *Perry v. Rogers*, 62 Neb. 898, 87 N.W. 1063 (1901); *Russo v. Williams, supra*; *Fricke v. Hart*, 206 Neb. 590, 294 N.W.2d 737 (1980). A person is justified in relying on a representation made to him or her in all cases where the representation is a positive statement of fact and where an investigation would be required to discover the truth. *Perry v. Rogers, supra*; *Russo v. Williams, supra*; *Fricke v. Hart, supra*; *Forker Solar, Inc. v. Knoblauch*, 224 Neb. 143, 396 N.W.2d 273 (1986); *Commerce Sav. Scottsbluff v. F.H. Schafer Elev.*, 231 Neb. 288, 436 N.W.2d 151 (1989).

Hayes' amended petition alleges that

> [p]rior to March 14, 1986, John P. Chudy . . . represented to Plaintiff that (a) Chocolate Marquis had just been purchased by Chudy and Equine Equities, Inc. for the sum of $50,000 and (b) that if Plaintiff would purchase such horse with him . . . Chudy had a ready, willing and able purchaser for the horse in the amount of $75,000. . . .
>
> . . . The representations were false and untrue in fact at the time they were made, and were known by [Chudy and Equine Equities] to be false. Plaintiff relied upon such statements to his detriment.

Although Chudy denied making these statements, that issue has been resolved against the appellant. In the alternative, Equine Equities contends that the statements complained of were not representations of fact, but were merely sales talk, puffing, or Chudy's opinion as to the value of Chocolate Marquis, which do not constitute a basis for fraud. In that regard, we have said:

> While actionable fraud may not be predicated upon sales talk, puffing, or the expression of a mere opinion as to value honestly made under circumstances that do not

> give another the right to rely thereon, representations of positive facts pertaining to the quality of the thing sold and relied upon by the purchaser, which are calculated to mislead and deceive, if proved false, constitute actionable fraud.

(Syllabus of the court.) *Vavricka v. Mid-Continent Co.*, 143 Neb. 94, 8 N.W.2d 674 (1943). The circumstances in this case are somewhat similar to those in *Vavricka*, where agents of the defendant company falsely represented the quality of the company's stock by making positive statements concerning payment of dividends, the extent of corporate assets, corporate expenses, and the existence of a reserve which would entitle the plaintiff to sell his stock to the company at any time after 1 year at its liquidating value.

Chudy's statements were positive representations of fact upon which Hayes could rely, and the statements did not constitute sales talk or puffing in the sense which the law implies.

Finally, Equine Equities contends that the district court erred in awarding Hayes the sum of $7,500, representing Hayes' equity in Smokeys Gray Too. The record shows that Smokeys Gray Too was the property of H - J Partnership and did not belong to Hayes individually. See Neb. Rev. Stat. § 67-308(1) (Reissue 1990). Neither the partnership nor Hayes' partner, Jondle, was a party to this lawsuit, and there is no evidence that the partnership has been formally dissolved. Although the trial court's judgment would equitably tend to restore the parties to their former positions, Hayes was not entitled to receive compensation for Smokeys Gray Too absent proof that the horse belonged to him.

That part of the trial court's judgment granting rescission of the contract and awarding Hayes $22,000 is affirmed. The award of $7,500 to Hayes, representing his equity in Smokeys Gray Too, is reversed, and the cause is remanded with directions to the trial court to enter judgment in conformity with this opinion.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

GRANT, J., not participating.

SHANAHAN, J., dissenting.

Although I do not necessarily disagree with the conclusion reached in this appeal, I do object to the simplistic approach taken by the majority in disposing of this appeal.

The subject action arises out of a contract for the sale of a horse and, therefore, arises out of a contract for the sale of goods, governed by the Nebraska Uniform Commercial Code-Sales, Neb. U.C.C. §§ 2-101 et seq. (Reissue 1980 & Cum. Supp. 1988). However, the majority fails to make any reference to the U.C.C. but, rather, resolves all issues on the basis of a common-law equitable action and remedy, notwithstanding the U.C.C. and apparent availability of a legal remedy under the code. A correct analysis and disposition under the appropriate standard of review depends on, and is determined by, the nature of the action and decision reviewed, that is, whether this court is reviewing an equity action and equitable remedy or whether the review relates to a law action based on the U.C.C. with its legal remedy or remedies. Consequently, as guidance in future actions, this court should have discussed applicability or inapplicability of the U.C.C. in relation to the result reached in this appeal. See, § 2-608; *Koperski v. Husker Dodge, Inc.*, 208 Neb. 29, 302 N.W.2d 655 (1981) (distinction between law and equity in reference to an action based on the U.C.C.; rescission vs. revocation of acceptance; exhaustion of statutory legal remedy before invocation of equity); 1 J. White & R. Summers, Uniform Commercial Code § 8-1 (3d ed. 1988).

The fact that the majority ignored the U.C.C. does not negate existence of the U.C.C. and a remedy in a law action under the code.

JULIAN K. SPITTLER AND DOROTHY J. SPITTLER, APPELLEES, V. HARRY D. NICOLA ET AL., APPELLEES, AND ROBERT W. HYDE AND FRANCES HYDE, APPELLANTS.

479 N.W.2d 803

Filed February 14, 1992. No. 89-771.

1. **Judgments: Records: Appeal and Error.** Meaningful appellate review requires a record that elucidates the factors contributing to the lower court judge's decision.
2. **Summary Judgment: Appeal and Error.** When reviewing a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from that evidence.
3. **Summary Judgment: Proof.** A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party.
4. **Contracts: Guaranty.** A guaranty is interpreted using the same general rules as are used for other contracts.
5. **Contracts: Guaranty: Consideration.** A promise to be surety for the performance of a contractual obligation, made to the obligee, is binding if the promise is in writing and signed by the promisor and recites a purported consideration.
6. **Contracts: Pleadings.** Matters which seek to avoid a valid contract are affirmative defenses.
7. **Contracts: Pleadings: Consideration.** Failure of consideration is an affirmative defense.
8. **Pleadings: Proof.** The burden of proving an affirmative defense rests upon the defendant.
9. **Contracts: Guaranty: Consideration.** Generally, when a contract of guaranty is entered into independently of the transaction that created the original or present debt or obligation, the guarantor's promise must be (1) in writing and (2) supported by a consideration which is distinct from that of the present debt.
10. **Contracts: Guaranty: Consideration: Time.** That there must be separate and distinct consideration for a guaranty if it is executed subsequent to the principal obligation is not an absolute rule. If a guaranty promise was made at a time subsequent to the creation of the principal obligation, the guaranty promise is still founded upon a consideration if the promise was given as the result of a previous arrangement, the principal obligation having been induced or created on the faith of the guaranty.
11. **Contracts: Time.** Instruments made in reference to and as a part of a transaction

should be considered and construed together. It is not important that the instruments were made or dated at different times if they are related to and were a part of the transaction.

12. **Contracts: Consideration.** There is sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. The benefit rendered need not be to the party contracting, but may be to anyone else at the contracting party's procurement or request.
13. **Contracts.** As a general rule, the proper construction of a written contract is a question of law.
14. _____. The meaning of an unambiguous contract presents questions of law.

Appeal from the District Court for Madison County: RICHARD P. GARDEN, Judge. Affirmed.

Donn C. Raymond for appellants.

Thomas E. Brogan, of Brogan & Stafford, P.C., for appellees Spittler.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Robert W. and Frances Hyde appeal a summary judgment holding them liable for rents, real estate taxes, utility bills, insurance premiums, maintenance costs, and interest because of their guaranty of a lease and its addendum.

We affirm the $30,429.50 summary judgment entered in favor of the appellees Julian K. and Dorothy J. Spittler by the district court for Madison County.

THE FACTS

In 1974, the appellees Spittler owned land in Madison County, Nebraska, upon which Grampy's International, Inc., a Nebraska corporation, (Grampy's) wished to operate a "Grampy's" restaurant. The parties entered into a long-term lease. It required the Spittlers to construct, and they did so construct, a restaurant building to Grampy's specifications. Grampy's, as lessee, agreed to pay rent, real estate taxes, and the cost of utilities, maintenance and insurance beginning June 1, 1974. The lease, accompanied by an addendum, was executed by the parties on April 15, 1974. There is no mention of a guaranty in either the lease or the addendum.

On April 20, 1974, a guaranty was executed and delivered to the Spittlers. It reads:

GUARANTY AGREEMENT

We, the undersigned, being interested in the business success of GRAMPY'S INTERNATIONAL, INC., A Nebraska Corporation, and *desiring to assist said Corporation in obtaining a Lease from JULIAN K. SPITTLER and DOROTHY J. SPITTLER*, Husband and Wife, on a Tract of land upon which a Grampy's Restaurant is to be constructed, *do hereby request and authorize Julian K. Spittler and Dorothy J. Spittler, Husband and Wife, to enter into a Lease, together with an Addendum thereto, with the Corporation* on a Tract of land located in the NW4NW4, of Section 34, Township 24 North, Range 1 West of the 6th P.M., Madison County, Nebraska, as more specifically described in said Lease, *and in consideration of said Lease, hereby guarantee all of the obligations of Grampy's International, Inc., as contained in said Lease and Addendum thereto.* This Guaranty shall be joint and several and the undersigned specifically waive notice of default and consent to extensions of time of performance in connection therewith.

Dated this 20th day of April, 1974.

(Emphasis supplied.)

The guaranty was signed personally by Harry D. Nicola and Mary Pat Nicola, husband and wife; William S. Whitehead and Margaret H. Whitehead, husband and wife; Robert W. Hyde and Frances Hyde, husband and wife, who are the appellants; and Donn C. Raymond and Virginia M. Raymond, husband and wife. Robert W. Hyde executed the lease and addendum as president of Grampy's.

THE PLEADINGS AND TRIAL COURT RULING

The Spittlers filed this lawsuit on the guaranty in the district court for Madison County on June 29, 1988. They alleged that they had entered into a lease and an addendum to the lease on April 15, 1974, with Grampy's; that the appellants and others, on April 20, 1974, executed and delivered to the Spittlers an

agreement which guaranteed all of Grampy's obligations under the lease and addendum; and that beginning in December 1987, Grampy's had failed to meet its obligations under the lease and addendum. The Spittlers' petition further alleged that demand for payment under the guaranty agreement had been made upon the guaranty's signatories, but that the signatories had made no payments. The Spittlers prayed for judgment against the guarantors "and each of them."

In their joint answer, the Hydes and the Raymonds claimed that the guaranty was executed separately from the lease and that they received no separate consideration for executing the guaranty agreement. Therefore, the Hydes and Raymonds contended that the guaranty agreement was void. The Raymonds additionally claimed that they received a discharge in bankruptcy on July 17, 1986, and that they were entitled to a judgment of dismissal as a matter of law.

The Hyde-Raymond answer also alleges that there had been assignments of the lease and a subsequent sublease which discharged their responsibilities under the guaranty agreement. The Hydes and Raymonds moved for leave to file a third-party complaint against one of the assignees. The motion was denied, and that ruling is not an issue in this appeal.

The status of the defendants Nicola and Whitehead is not reflected in the record. No responsive pleadings on their behalf were filed.

On May 17, 1989, following a hearing on April 20 at which the lease, addendum, guaranty, and the Spittlers' affidavit were received in evidence, the trial court granted the Spittlers' motion for summary judgment and assessed damages against the Hydes in the sum of $30,429.50. The court dismissed the petition as against the Raymonds.

THE APPEAL

The Hydes assign as error the trial court's (1) finding that there was no material issue of fact, (2) sustainment of the Spittlers' motion for summary judgment, and (3) failure to grant the appellants' motion for summary judgment. Since the appellants' motion for summary judgment is not contained in the record, we will not discuss that assignment of error.

Meaningful appellate review requires a record that elucidates the factors contributing to the lower court judge's decision. See, *First Nat. Bank v. Schroeder*, 218 Neb. 397, 355 N.W.2d 780 (1984). See, also, *Stevens v. Stevens*, 228 Neb. 84, 421 N.W.2d 429 (1988). This court will not speculate upon what basis the appellants sought summary judgment.

On appeal, in substance, the Hydes argue that summary judgment should not have been entered against them because the evidence at the summary judgment hearing failed to show that there was consideration for the guaranty.

STANDARD OF REVIEW

In considering whether the trial court was correct in granting the Spittlers' motion for summary judgment, we are guided by the following principles:

When reviewing a motion for summary judgment, an appellate court views the evidence in a light most favorable to the party opposing the motion and gives that party the benefit of all reasonable inferences deducible from that evidence. *Flamme v. Wolf Ins. Agency, ante* p. 465, 476 N.W.2d 802 (1991).

A party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law if the evidence presented for summary judgment remains uncontroverted. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents a judgment as a matter of law for the moving party. *Id.*

A guaranty is interpreted using the same general rules as are used for other contracts. *Nogg Bros. Paper Co. v. Bickels*, 233 Neb. 561, 446 N.W.2d 729 (1989).

"A promise to be surety for the performance of a contractual obligation, made to the obligee, is binding if (a) the promise is in writing and signed by the promisor *and recites a purported consideration* . . . ." (Emphasis supplied.) Restatement (Second) of Contracts § 88 at 234 (1981).

Matters which seek to avoid a valid contract are affirmative

defenses. *Lease Northwest v. Davis*, 224 Neb. 617, 400 N.W.2d 220 (1987). Failure of consideration is an affirmative defense. See, *Pabst v. First American Distrib., Inc.*, 222 Neb. 591, 386 N.W.2d 422 (1986); *Caldwell v. Wells*, 174 Neb. 288, 117 N.W.2d 486 (1962). The burden of proving an affirmative defense rests upon the defendant. See *Erftmier v. Eickhoff*, 210 Neb. 726, 316 N.W.2d 754 (1982).

Generally, when a contract of guaranty is entered into independently of the transaction that created the original or present debt or obligation, the guarantor's promise must be (1) in writing, see Neb. Rev. Stat. § 36-202 (Reissue 1988), and (2) supported by a consideration which is distinct from that of the present debt, see, 38 Am. Jur. 2d *Guaranty* § 45 (1968) and *Waller v. Missouri City State Bank*, 482 S.W.2d 40 (Tex. Civ. App. 1972). See, also, *Moses v. Lawrence County Bank*, 149 U.S. 298, 13 S. Ct. 900, 37 L. Ed. 743 (1893); *Pacific Industries, Inc. v. Mountain Inn, Inc.*, 232 F. Supp. 801 (W.D. Ark. 1964); *Estate of Bogley v. United States*, 514 F.2d 1027 (Ct. Cl. 1975).

In this case, the Spittler-Grampy's lease and its addendum were in force for 5 days before the Hydes' written guaranty was executed and delivered to the Spittlers.

That there must be separate and distinct consideration for a guaranty if it is executed subsequent to the principal obligation is not an absolute rule. For instance, if a guaranty promise was made at a time subsequent to the creation of the principal obligation, the guaranty promise is still founded upon a consideration if the promise was given as the result of a previous arrangement, the principal obligation having been induced or created on the faith of the guaranty. See, *In re Estate of Tynan*, 142 Neb. 671, 7 N.W.2d 628 (1943); *United States v. Burgreen*, 591 F.2d 291 (5th Cir. 1979); *United States v. Lowell*, 557 F.2d 70 (6th Cir. 1977); *United States v. Interlakes Machine & Tool Co.*, 400 F. Supp. 59 (E.D. Mich. 1975). See, also, 38 Am. Jur. 2d *Guaranty* § 45 (1968).

Instruments made in reference to and as a part of a transaction should be considered and construed together. *Northland Mortgage Co. v. Royalwood Estates, Inc.*, 190 Neb. 46, 206 N.W.2d 328 (1973). It is not important that the instruments were made or dated at different times if they are

related to and were a part of the transaction. See *Northland Mortgage Co., supra.*

There is sufficient consideration for a promise if there is any benefit to the promisor or any detriment to the promisee. The benefit rendered need not be to the party contracting, but may be to anyone else at the contracting party's procurement or request. *Bock v. Bank of Bellevue*, 230 Neb. 908, 434 N.W.2d 310 (1989). Here, the guaranty provided an obvious benefit to Grampy's in permitting it to obtain a lease from the Spittlers. By their own admission in the guaranty, the Hydes also received a benefit. The guaranty recites that they were "interested in the business success of GRAMPY'S INTERNATIONAL, INC., A Nebraska Corporation," and desired to assist the corporation in obtaining the lease from the Spittlers.

With the foregoing rules of law in mind and remembering that as a general rule, the proper construction of a written contract is a question of law, *Newman v. Hinky Dinky*, 229 Neb. 382, 427 N.W.2d 50 (1988), and that the meaning of an unambiguous contract presents questions of law, *Lueder Constr. Co. v. Lincoln Electric Sys.*, 228 Neb. 707, 424 N.W.2d 126 (1988), we continue to examine the Hydes' guaranty together with the lease and the addendum it guarantees.

In the guaranty, the Hydes acknowledge that they were executing the guaranty "*to assist*" Grampy's "*in obtaining a Lease*" from the Spittlers. (Emphasis supplied.) In the guaranty, the Hydes *"request and authorize" the Spittlers to enter into a lease and its addendum, "and in consideration of said Lease," the Hydes "hereby guarantee all of the obligations of Grampy's International, Inc., as contained in said Lease and Addendum thereto."* (Emphasis supplied.) These recitations in the guaranty are acknowledgments by the Hydes that at the time the lease and addendum were entered into, there was an understanding between the signatories to the guaranty, including the Hydes, and the Spittlers that the signatories to the guaranty would guarantee the lease and its addendum. The guaranty is in writing and recites a purported consideration, as required by Restatement (Second) of Contracts § 88 (1981). To contest that recitation of consideration and the evidence of consideration shown by the guaranty itself and to show that a

genuine issue of material fact existed, it was necessary for the Hydes to adduce some evidence that there was a failure of consideration for their guaranty. The record fails to reflect any evidence that there was a failure of consideration for the guaranty. That being true, there was no material issue of fact, and the trial court was correct in granting summary judgment in favor of the Spittlers.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. EARL C. RUSSELL, APPELLANT.

479 N.W.2d 798

Filed February 14, 1992. No. 90-429.

1. **Postconviction: Appeal and Error.** In an appeal of a postconviction proceeding, the findings of the district court will not be disturbed unless they are clearly erroneous.
2. **Postconviction.** A court is not required to grant an evidential hearing on a motion for postconviction relief which alleges only conclusions of law or fact; nor is an evidential hearing required under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleadings of facts in a motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable.
3. **Pleas: Waiver: Effectiveness of Counsel.** Although normally a voluntary guilty plea waives every defense to a charge, whether the defense is procedural, statutory, or constitutional, a court will consider a claim that the guilty plea was the result of ineffective assistance of counsel.
4. **Postconviction: Proof.** One moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution.
5. **Postconviction.** A motion for postconviction relief must allege facts.
6. **Records: Appeal and Error.** It is incumbent on the party appealing to present a record which supports the errors assigned; absent such a record, as a general rule, the decision of the lower court is to be affirmed.
7. **Postconviction: Sentences.** Excessive sentence is not a proper subject for postconviction relief.
8. **Sentences: Appeal and Error.** As a general rule, a sentence imposed within the limits prescribed by statute will not be set aside as excessive absent an abuse of

discretion.

9. **Sentences.** There is no requirement that the sentencing court compare the defendant's case with all other similarly charged felonies prior to imposing sentence.

Appeal from the District Court for Douglas County: PAUL J. HICKMAN, Judge. Affirmed.

Earl C. Russell, pro se.

Don Stenberg, Attorney General, and J. Kirk Brown for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Defendant, Earl C. Russell, appeals from the order denying, without an evidentiary hearing, his motion for postconviction relief brought in the district court pursuant to Neb. Rev. Stat. §§ 29-3001 et seq. (Reissue 1989). We affirm.

In an appeal of a postconviction proceeding, "the findings of the district court will not be disturbed unless they are clearly erroneous." *State v. Blank, ante* p. 188, 190, 474 N.W.2d 689, 691 (1991). Additionally:

> " 'A court is not required to grant an evidential hearing on a motion for postconviction relief which alleges only conclusions of law or fact; nor is an evidential hearing required under the Nebraska Postconviction Act when (1) the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant, or (2) notwithstanding proper pleadings of facts in a motion for postconviction relief, the files and records in the movant's case do not show a denial or violation of the movant's constitutional rights causing the judgment against the movant to be void or voidable.' "

State v. Rehbein, 235 Neb. 536, 538-39, 455 N.W.2d 821, 824 (1990).

On December 2, 1983, the defendant pleaded guilty to a two-count information charging him in count I with assault in

the first degree, in violation of Neb. Rev. Stat. § 28-308(1) (Reissue 1989), and in count II with robbery, in violation of Neb. Rev. Stat. § 28-324(1) (Reissue 1989). Before accepting this plea, the trial court questioned him extensively to make sure he knowingly and voluntarily waived his rights in pleading guilty. The trial court explained to Russell the possible pleas he might enter. The court established that the defendant was not under the influence of drugs or alcohol. The court established that Russell understood and waived his right to be presumed innocent until proven guilty beyond a reasonable doubt, his right to a public trial by jury, his rights to confront witnesses and to compulsory process to procure their attendance, his right against self-incrimination, and his right to the suppression of illegally obtained confessions. Russell acknowledged his understanding of all these rights. He also answered, "Yes," when the court asked if he understood and was voluntarily waiving his rights. The trial court also advised Russell of the maximum sentences he faced and determined that he understood the possible sentences. The trial court then found a factual basis existed upon which to accept the pleas of guilty, accepted them, and found defendant guilty on both counts. Russell was sentenced on February 27, 1984, to 6 to 20 years on count I and 15 to 50 years on count II, the sentences to run consecutively. The statutory penalties provided for these crimes are imprisonment for 1 to 20 years and 1 to 50 years, respectively.

As his assignments of error, Russell claims (1) trial counsel was ineffective in failing to inform the trial court of a plea agreement; (2) counsel was ineffective in raising only frivolous issues on appeal; (3) the trial court imposed sentences which were cruel and unusual, in violation of his right to equal protection; and (4) the trial court failed to consider Russell's lack of education and his mental instability in sentencing him.

Although normally a voluntary guilty plea waives every defense to a charge, whether the defense is procedural, statutory, or constitutional, a court will consider a claim that the guilty plea was the result of ineffective assistance of counsel. *State v. Stranghoener*, 212 Neb. 203, 322 N.W.2d 407 (1982).

Russell's first assignment of error depends upon the truth or

falsity of the allegation that there was a plea agreement between his trial counsel and the State which was not brought to the trial court's attention. After determining that the defendant was pleading guilty because he was guilty, the trial court asked if a plea agreement had been reached:

> THE COURT: Mr. McKenney, has there been any plea negotiations in this case and if so what were they?
>
> MR. McKENNEY [deputy county attorney]: None, Your Honor.
>
> THE COURT: Is that correct, Mr. Pruss?
>
> MR. PRUSS [Russell's counsel]: That's correct.
>
> THE COURT: And is that your understanding, Mr. Russell, that there has been no plea negotiations in this case?
>
> THE DEFENDANT: Yes, sir.

As may be seen from the portion of the bill of exceptions quoted above, the primary evidence that no agreement existed comes from Russell himself. In addition to the statement made above, Russell twice stated that no promises had been made to him.

Russell now argues on appeal that his trial counsel advised him to mislead the trial court by stating that no promises had been made nor plea agreement reached. This "fact" was not alleged in Russell's postconviction motion. "One moving for postconviction relief must allege facts which, if proved, constitute a denial or violation of his or her rights under the Nebraska or federal Constitution." *State v. Otey*, 236 Neb. 915, 925, 464 N.W.2d 352, 360 (1991). It follows that the postconviction court cannot make any determination based upon a fact not presented, and therefore this "fact" cannot be considered by this court on appeal.

This court faced an assigned error similar to the one Russell now complains of in *State v. Rehbein*, 235 Neb. 536, 455 N.W.2d 821 (1990). There, a defendant seeking postconviction relief alleged that he pleaded guilty only because his counsel represented to him that he would get better treatment in jail after pleading guilty. This court reviewed the plea proceedings, at which the defendant stated that he had been made no promises, was pleading guilty freely and voluntarily, and was

satisfied with his counsel. It was held that an evidentiary hearing was unnecessary, and in doing so, this court stated, "To ignore the repeated assertions made and the answers given 6 years ago in favor of a story which has been developed following 5 years behind bars would make a mockery out of our judicial proceedings." *Id.* at 544, 455 N.W.2d at 827.

Although the more prudent course to follow may be to grant an evidentiary hearing if a defendant makes a factual allegation supporting a claim of ineffective assistance of counsel, where the record presents nothing to overcome the presumption that the defendant was telling the truth at the time of his plea when he told the trial court the facts were different from those now alleged, that would indeed make a mockery out of our judicial process. As stated in *State v. Scholl*, 227 Neb. 572, 580, 419 N.W.2d 137, 142 (1988):

> If the dialogue which is required between the court and the defendant whereat, as here, the court receives an affirmative answer as to whether the defendant understands the specified and full panoply of constitutional rights . . . is to be impugned by a mere recantation made after the doors of the prison clang shut, we are wasting our time and that of the trial judges, making a mockery out of the arraignment process.

In his second assignment of error Russell claims the court, during postconviction proceedings, failed to find that defense counsel rendered ineffective assistance of counsel by raising only frivolous issues on direct appeal. However, Russell's motion simply states the bald conclusion that his counsel presented only frivolous arguments. He did not inform the court what those arguments were, nor did he allege any facts from which the district court could determine the frivolity of the issues presented on direct appeal. A motion for postconviction relief must allege facts. *State v. Otey, supra.*

Russell argues on appeal that his appellate counsel, in moving to withdraw, conceded that all issues raised in Russell's direct appeal were frivolous. However, the record Russell provided this court does not contain this motion. It is incumbent on the party appealing to present a record which supports the errors assigned; absent such a record, as a general

rule, the decision of the lower court is to be affirmed. *Bert Cattle Co. v. Warren*, 238 Neb. 638, 471 N.W.2d 764 (1991).

The district court correctly refused an evidentiary hearing on this issue, as " ' "the motion for postconviction relief does not contain sufficient factual allegations concerning a denial or violation of constitutional rights affecting the judgment against the movant . . . ." ' " *State v. Rehbein, supra* at 538, 455 N.W.2d at 824. The second assignment of error fails.

Russell's third and fourth assignments of error relate to his sentences: whether the district court erred in failing to find Russell's sentences cruel and unusual, and whether the district court erred in failing to find that the trial court failed to consider defendant's lack of education and his mental instability in sentencing him. Russell is also asking this court to find his sentences excessive because they are disproportionate to others imposed based on the same charges and because the trial court did not consider or give proper weight to certain factors Russell urges were mitigating.

Excessive sentence is not a proper subject for postconviction relief. *State v. Isikoff*, 223 Neb. 679, 392 N.W.2d 783 (1986). Russell's third and fourth assignments of error fail for this reason.

Moreover, there is no underlying basis supporting either of these assignments of error were they properly before the court. "As a general rule, a sentence imposed within the limits prescribed by statute will not be set aside as excessive absent an abuse of discretion." *State v. Haynie, ante* p. 478, 490, 476 N.W.2d 905, 914 (1991). The sentences were within the limits prescribed by statute.

As to the crime itself, the victim was an 87-year-old woman whose home Russell invaded on the pretext of using the telephone, after his original plan to burglarize the home failed. He pushed her to the floor, picked up her cane, and beat her so severely with it that she had to be hospitalized in critical condition, ultimately lost an eye, and suffered psychiatric stress requiring hospitalization. After beating the victim, Russell stole a clock from her home.

Furthermore, the record reveals that Russell has been convicted of several thefts and possession of marijuana and

drug paraphernalia. The sentencing court took into consideration the nature of the crime; Russell's previous criminal record, as well as his lack of education; his substance abuse; and his disadvantageous family life.

Finally, as to Russell's claim that he was sentenced disproportionately to those involved in similar cases, "there is no requirement that the [sentencing] court compare the defendant's case with all other similarly charged . . . felonies prior to imposing sentence." *State v. Carlson*, 227 Neb. 503, 507, 418 N.W.2d 561, 563 (1988). There was no abuse of discretion and no merit to any of the defendant's arguments.

The judgment of the district court, dismissing Russell's action for postconviction relief, was correct and is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. JIMMIE LEE WILLIAMS, APPELLANT.

480 N.W.2d 390

Filed February 14, 1992. No. 90-525.

1. **Convictions: Appeal and Error.** In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, an appellate court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them.
2. **Verdicts: Appeal and Error.** On a claim of insufficiency of the evidence, a guilty verdict will not be set aside in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may a guilty verdict be set aside as unsupported by evidence beyond a reasonable doubt.
3. **Criminal Law: Witnesses: Marriage: Waiver.** During the existence of the marriage, a husband and wife can in no criminal case be a witness against the other. This privilege may be waived only with the consent of both spouses. These privileges may not be claimed in any criminal case where the crime charged is a crime of violence.
4. **Criminal Law: Words and Phrases.** The phrase "crime of violence" is not vague in the context of Neb. Rev. Stat. § 27-505 (Reissue 1989).

5. **Due Process: Trial: Juries.** Due process under the 14th amendment requires that the accused receive a trial by an impartial jury free from outside influences. In any individual case, the observance of this guarantee is evaluated in light of the totality of the circumstances of the case.
6. **Juror Qualifications.** A qualified juror need not be totally ignorant of the facts and issues involved. A venireperson is qualified to sit on the jury, even when he or she has previous knowledge of the case, if that juror can lay aside his or her impression or opinion and render a verdict based on the evidence presented in court.
7. **Presumptions: Jurors.** Although adverse pretrial publicity can create a presumption of prejudice in a community such that the jurors' claims that they can be impartial should not be believed, partiality may be presumed only in situations where the general atmosphere in the community or courtroom is sufficiently inflammatory.
8. _____: _____. A jury's extrajudicial knowledge that a codefendant has pleaded guilty is not in and of itself grounds to presume juror prejudice.
9. **Criminal Law: Venue.** Venue in a criminal case can be transferred on the defendant's motion where it shall appear to the court that a fair and impartial trial cannot be had in the county in which the crime was committed.
10. **Venue.** The factors to be considered in determining whether a change of venue is required due to pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated in the areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in selection of the jury, the number of challenges exercised during voir dire, the severity of the offenses charged, and the size of the area from which the venire is drawn.
11. **Venue: Appeal and Error.** A trial court's ruling on a motion for change of venue will not be disturbed absent an abuse of discretion.
12. **Trial: Waiver: Juries.** Failure to insist on a ruling on an objection waives the objection. Logic dictates that the same principle would apply to a failure to insist on a ruling on a challenge for cause.
13. **Trial: Joinder: Juries: Indictments and Informations.** Where two or more offenses are properly joined, a trial court does not err in limiting the defendant to the number of peremptory challenges statutorily available for the most serious of the offenses. A defendant is not entitled to additional peremptory challenges because the indictment charges separate offenses in separate counts.
14. **Jury Instructions: Appeal and Error.** In considering claimed error regarding an instruction, all instructions given must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.

Appeal from the District Court for Hamilton County: WILLIAM H. NORTON, Judge. Affirmed.

James A. Wagoner for appellant.

Don Stenberg, Attorney General, Mark D. Starr, and, on brief, Susan M. Ugai for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

HASTINGS, C.J.

Following a trial by jury the defendant, Jimmie Lee Williams, was convicted of the April 22, 1989, first degree murder of Richard Dale Kinikin, as well as a second count of use of a weapon to commit a felony. He was sentenced to a term of life imprisonment, as well as a consecutive term of 6 1/2 to 20 years on the second count. Defendant has appealed to this court, assigning 17 alleged errors, which may be combined to constitute the following: (1) insufficiency of the evidence, (2) testimony of defendant's spouse in violation of spousal immunity, (3) failure to grant defendant's request for change of venue, (4) failure to sustain defendant's challenge for cause of a juror, (5) failure to grant defendant six extra peremptory challenges, (6) errors in the admission of evidence, (7) error in giving an instruction regarding self-defense, and (8) error in considering victim impact information during the sentencing phase of trial. We affirm.

Although the testimony of the various witnesses is contradictory to some degree, there appears to be no reasonable doubt that defendant deliberately and with premeditation shot and killed Kinikin.

Defendant was proceeding westerly on Interstate 80 in his tractor-trailer unit, which was then being driven by his wife. He got into a conversation over his CB radio with another truckdriver, which was described as degenerating into a "cuss fight." Defendant testified that the voice on the other radio stated, "I got a mind to make you put that big old blue freight shaker [truck] in the ditch." He also testified that he, the defendant, said, "I got a good mind to have my wife just come on, go around you and you can take your garbage mouth somewhere else." The other driver, or the other voice on the CB, was said to have stated, "You come on up here and if you are still sitting there in that seat . . . I'll blow a hole in you."

Defendant then testified that he got his rifle from behind the

seat and said over the radio, "You are not going to hurt me. I am not going to let you. You just go on." He then asked his wife to pull over and stop.

The testimony of defendant's wife differed somewhat from that of her husband. She testified that defendant "was just like . . . egging him [the other driver] on. . . . He wanted the truck driver to answer him . . . and the truck driver wouldn't answer him." The other driver finally responded by telling the defendant that "he was supposed to get in the back of the bunk . . . ."

Williams' truck stopped behind that of Kinikin. Defendant testified that Kinikin walked around the front of his truck and stopped at the passenger side. Kinikin then opened the passenger side door and reached inside. While Williams started to get out of his truck, he saw Kinikin stick something in the back of his pants. It looked to Williams like Kinikin was tucking the object between his body and his "britches." Kinikin then reached up, pushed the latch down on the door, shut it, and walked toward Williams' truck. Williams could not see what Kinikin had put in his pants, but defendant thought it was a weapon.

Defendant testified that when he got out of his truck, he was wearing on his feet his white socks without his boots. Kinikin was shaking his left finger at Williams while walking toward him, having his other hand clenched at his side. Williams said he became frightened and tried to load his rifle. After a few seconds, he was able to put a cartridge in the chamber. Williams then put the gun up to his shoulder and pointed it at Kinikin.

Kinikin then stopped walking toward Williams, according to defendant. Kinikin looked at Williams for a second and said, "Now, we'll see," which caused Williams to jump back. Defendant said Kinikin appeared angry and shouted. Williams then stated that he realized that this voice belonged to the man with whom he had had the "cuss fight" over the radio. According to Williams, Kinikin reached behind his back with his right hand. Williams reacted by stepping backward, bringing the gun upward, and shooting Kinikin. After Williams had pulled the trigger, he got back in his truck and told his wife to go.

Williams' wife testified that she did not see anything in Kinikin's hands. She saw her husband put a bullet in the rifle. Defendant then put the rifle to his shoulder and fired. When Williams came back to the truck, his wife said, "My God, did you have to shoot him?" The defendant did not respond to that question, but later told her that "[t]hat was the stupidest thing I ever did."

The defendant's wife also testified that he instructed her as to the story they would tell if stopped by the police. In the main it consisted of a recitation that he was asleep in the bunk, that she started to pull over behind Kinikin's truck to help a truckdriver who was stopped on the side of the road, but that defendant told her not to stop, so she therefore pulled back onto the highway.

There were several other witnesses whose testimony pointed to the killing of Kinikin by Williams. Kinikin died of the gunshot wound, according to the testimony of a pathologist.

In determining the sufficiency of the evidence to support a finding of guilt in a criminal case, this court does not resolve conflicts in the evidence, determine the plausibility of explanations, or weigh the evidence. Those matters are for the finder of fact, whose findings must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support them. *State v. Laymon, ante* p. 80, 474 N.W.2d 458 (1991).

On a claim of insufficiency of the evidence, the Supreme Court will not set aside a guilty verdict in a criminal case where such verdict is supported by relevant evidence. Only where evidence lacks sufficient probative force as a matter of law may the Supreme Court set aside a guilty verdict as unsupported by evidence beyond a reasonable doubt. *State v. Laymon, supra.*

The evidence, even limiting it to the testimony of the defendant himself, supports a finding of guilty beyond a reasonable doubt.

The defendant assigns error to the overruling of his objection to the testimony of his wife. There was no error in admitting that testimony. Neb. Rev. Stat. § 27-505 (Reissue 1989) provides in part as follows:

(2) During the existence of the marriage, a husband and

> wife can in no criminal case be a witness against the other. This privilege may be waived only with the consent of both spouses.
>
> (3) These privileges may not be claimed:
>
> (a) In any criminal case where the crime charged is a crime of violence . . . .

Defendant questions the validity of that statute, alleging it is unconstitutionally vague. He concedes that in *State v. Palmer*, 224 Neb. 282, 399 N.W.2d 706 (1986), *cert. denied* 484 U.S. 872, 108 S. Ct. 206, 98 L. Ed. 2d 157 (1987), this court held that the phrase "crime of violence" is not vague in the context of § 27-505, but apparently asks this court to overrule *Palmer*. We decline to do so. This assignment of error is without merit.

Williams claims that prejudicial publicity in Hamilton County "prevented him from receiving a fair trial by an impartial panel." Brief for appellant at 28. Specifically, Williams argues that he was entitled to a change of venue because of the sheer number of venirepersons admitting knowledge of the case from the media, because he was "newsmaker of the year in the arena of trial," because he was "unfairly drawn into disputes regarding Sheriff treatment of prisoners and cost of trial," and because he was "prejudicially associated with the Co-Defendant's [defendant's wife] admission of guilt." *Id.*

"Due process [under the 14th Amendment] requires that the accused receive a trial by an impartial jury free from outside influences." *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). In any individual case, the observance of this guarantee is evaluated in light of the totality of the circumstances of the case. See *Murphy v. Florida*, 421 U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975).

The fact that many, most, or even all of the jurors knew something about the case in advance would not entitle Williams to a change of venue. The U.S. Constitution does not guarantee a criminal defendant a jury totally ignorant of the facts and circumstances of his or her case. *Murphy v. Florida, supra* at 421 U.S. at 799-800 ("[q]ualified jurors need not . . . be totally ignorant of the facts and issues involved"). A venireperson is qualified to sit on the jury, even where he has previous

knowledge of the case, if he " 'can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' " 421 U.S. at 800 (quoting *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961)).

Only one of 40 venirepersons—and no one actually seated on the jury—expressed any reservation about her ability to decide the case solely on the evidence, and Williams' challenge for cause to that venireperson apparently was not upon that ground. Williams points to nothing in the record indicating that any particular juror was biased, and an independent review of the record does not disclose actual partiality.

It is true that "adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed." *Patton v. Yount*, 467 U.S. 1025, 1031, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984). Partiality may be presumed only in situations where "the general atmosphere in the community or courtroom is sufficiently inflammatory." *Murphy v. Florida, supra* at 421 U.S. at 802.

Sheppard v. Maxwell, supra, while involving extensive pretrial print publicity such as Williams claims existed in this case, required more than just that publicity in order to create the presumption of juror prejudice. *Sheppard* involved a highly publicized criminal case—the trial of Dr. Sam Sheppard for the alleged murder of his wife. The pretrial publicity in the case included repeated assertions that Sheppard had refused to take a lie detector test; detailed allegations of Sheppard's marital unfaithfulness; accusations that Sheppard, his family, and his lawyers were "stalling" the investigation; and editorial calls for further investigation and for Sheppard's arrest and prosecution. Most of the courtroom space was assigned to the press corps members, whose presence hindered orderly proceedings; testimony and photographs of exhibits were published daily during the trial, in which jurors were not sequestered; and the prosecution disclosed certain anticipated testimony, which was repeated in the press, that failed to materialize at trial. The Court held that this "totality of circumstances" was " 'inherently lacking in due process,' " and did not require " 'a showing of identifiable [juror]

prejudice to the accused.' " 384 U.S. at 352.

In *Rideau v. Louisiana*, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963), the defendant in a capital murder case was interrogated by the local sheriff and confessed to the crime in a film which was broadcast three times and viewed by no less than 53,000 of the 150,000 people in the parish in which he was tried and convicted. The Court did

> not hesitate to hold, without pausing to examine a particularized transcript of the *voir dire* examination of the members of the jury, that due process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised "interview."

373 U.S. at 727. *Estes v. Texas*, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965), addressed a situation of the pervasive intrusion of television into a criminal trial. A pretrial hearing on motions to restrict media coverage and for a continuance was broadcast on television. At least 12 cameramen were present in the courtroom, and the courtroom was cluttered with television equipment and microphones. Portions of the trial were broadcast live, and the entire trial was filmed by cameras in a large booth at the back of the courtroom. The Court found that the intrusion of the press into the proceedings threatened the "solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial," 381 U.S. at 540, and reversed the conviction.

The pretrial publicity of which Williams complains included articles from the Aurora News-Register, the Grand Island Daily Independent and the Grand Island Sunday Independent, and the Omaha World-Herald, all newspapers of general circulation in Hamilton County. These stories consisted predominantly of news articles detailing Kinikin's death, the subsequent investigation, the arrest of Williams and his wife, and the pretrial court proceedings, including defendant's motion for a change of venue. Another news item contained a "[y]ear end review" article from the News-Register, consisting of a photo of Williams in handcuffs and leg irons being led by a uniformed peace officer, along with two brief paragraphs relating that the Nebraska State Patrol was searching for a "blue semi truck

tractor with an anteater cab" and that Williams had been arrested "in connection with" Kinikin's death. There was also a News-Register article regarding a budget dispute between the Hamilton County Board and the county sheriff, containing a brief reference to the cost of Williams' pretrial detention and upcoming trial. Additionally, there was an article reporting Williams' wife's plea of guilty to the accessory charge, under the headline "Williams enters plea of guilty."

The trial court reserved ruling on Williams' pretrial motion for a change of venue until after voir dire. The court later noted that the evidence adduced at the hearing on the motion, standing alone, "[would] not support a finding in favor of the defendant on this motion."

The record in this case discloses none of the yellow journalism, investigatorial bias, or prosecutorial misconduct evident in *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). Neither was Williams televised confessing to the crime of which he was accused, as in *Rideau*, nor does the record reveal any intrusion of the electronic media into the court proceedings, as in *Estes*.

Nor does the publicity given Williams approach the level of that found in *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961), in which the Supreme Court presumed juror bias arising solely from pretrial publicity. In that case, six murders had been committed in the Evansville, Indiana, area. Media coverage of the crimes—which extended into Gibson County, where Irvin was ultimately tried—included "curbstone opinions" as to Irvin's guilt and the appropriate punishment; "a barrage of newspaper headlines, articles, cartoons, and pictures [in newspapers] delivered regularly to approximately 95% of the dwellings in Gibson County," 366 U.S. at 725; radio and television newscasts detailing Irvin's criminal history; police lineup identification of Irvin; the fact that Irvin had taken a lie detector test; Irvin's confession to all six of the Evansville area murders; and his offer, rejected by the state, to plead guilty to avoid a death sentence.

Williams stresses the news article mentioning him in the context of the intragovernmental budget dispute and the headline "Williams enters plea of guilty." Neither of these items

is of the kind found in *Irvin* to be predicative of presumed prejudice. Williams fails to explain how jurors might be predisposed to believe he is guilty just because it cost the county money to detain him before trial. Common sense would tell any juror in a case where the defendant was held before trial that such incarceration costs the government money. Likewise, common sense would tell any venireperson or potential venireperson in the courtroom before Williams' trial that since he was proceeding to trial, Jimmie Lee Williams was not the "Williams" who had pleaded guilty. Furthermore, the jury's extrajudicial knowledge that a codefendant has pleaded guilty is not in and of itself grounds to presume juror prejudice. See, *U.S. v. De La Vega*, 913 F.2d 861 (11th Cir. 1990); *U.S. v. Beniach*, 825 F.2d 1207 (7th Cir. 1987); *United States v. Martin*, 740 F.2d 1352 (6th Cir. 1984).

The pretrial publicity in this case did not rise to the level of that in *Irvin*, such as would compel a presumption of juror partiality. This conclusion is supported by the recent analysis of the U.S. Supreme Court in *Mu'Min v. Virginia*, ____ U.S. ____, 111 S. Ct. 1899, 114 L. Ed. 2d 493 (1991). Mu'Min was a prisoner serving time for a previous murder, accused of murdering a woman while on prison work release. Press reports focused on the negligence of prison officials such as would have allowed Mu'Min to escape and commit the murder. Additionally, "a great deal of . . . media coverage . . . was devoted to Mu'Min and the details of his crime." 111 S. Ct. at 1910 (Marshall, J., dissenting.) Specifically, local media disclosed that the victim was "discovered in a pool of blood, with her clothes pulled off and semen on her body," 111 S. Ct. at 1911 (Marshall, J., dissenting); that Mu'Min returned to the prison work detail and had lunch after the crime; that Mu'Min, a "murderer," had confessed to the crime; that Mu'Min had had disciplinary problems in prison, including allegations that he beat another prisoner; and that a fellow inmate described Mu'Min as a " ' "lustful" ' individual who did ' "strange stuff." ' " *Id.* While Mu'Min did not claim presumed juror prejudice, the majority of the Court compared the publicity in his case unfavorably to that in *Irvin v. Dowd, supra*, in determining that he was not constitutionally entitled to voir dire

questions regarding the content of pretrial publicity to which venirepersons had been exposed.

The publicity in *Mu'Min* was far more inflammatory and prejudicial to that defendant than anything Williams presents in support of his claim of error, yet the U.S. Supreme Court in *Mu'Min* made it clear that the publicity there fell on the other side of the presumed prejudice line from the publicity in *Irvin*. This further compels the conclusion that Williams had no constitutional right to a change of venue.

Under Nebraska law, venue in a criminal case can be transferred on the defendant's motion where "it shall appear to the court . . . that a fair and impartial trial cannot be had" in the county in which the crime was committed. Neb. Rev. Stat. § 29-1301 (Reissue 1989). The factors to be considered in determining whether a change of venue is required due to pretrial publicity include the nature of the publicity, the degree to which the publicity has circulated in the areas to which venue could be changed, the length of time between the dissemination of the publicity complained of and the date of trial, the care exercised and ease encountered in selection of the jury, the number of challenges exercised during voir dire, the severity of the offenses charged, and the size of the area from which the venire is drawn. *State v. Red Kettle, ante* p. 317, 476 N.W.2d 220 (1991). "A trial court's ruling on a motion for change of venue will not be disturbed absent an abuse of discretion." *State v. Boppre*, 234 Neb. 922, 935, 453 N.W.2d 406, 419 (1990).

The publicity in this case was exclusively factual. Indeed, most of the publicity did not reveal any of the evidence to be adduced against Williams at trial. There were no editorial expressions of hostility or animosity toward Williams. The nature of the publicity does not compel a change of venue. See, *State v. Boppre, supra* (news accounts which are factual and do not reveal hostility or animosity to the defendant do not serve as a basis for a change of venue); *State v. Jacobs*, 226 Neb. 184, 410 N.W.2d 468 (1987) (factual news accounts reporting the occurrence of crime, one defendant's call for an ambulance, the charging of defendants, and the appointment of special prosecutor did not furnish a basis for change of venue); *State v. Kern*, 224 Neb. 177, 397 N.W.2d 23 (1986) (factual newspaper

articles reporting the killing, the defendant's arrest and bond hearing, the personal history of parties, and the funeral date of victim did not require change of venue).

Most of the news coverage of the Kinikin killing was distant in time from Williams' trial. Of all the news articles offered into evidence in support of Williams' motion, only two appeared within 3 months of the trial. One of these was the year end review feature in the Aurora News-Register on January 3, 1990. It contains a photo of Williams in handcuffs and leg irons and the following passages:

> APRIL
>
> . . . .
>
> —The Nebraska State Patrol was searching for a blue semi truck tractor with an anteater cab inconnection [sic] with the death of a 42-year-old Arkansas struck [sic] driver who was shot along busy Interstate 80 in Hamilton County east of Aurora.
>
> MAY
>
> . . . .
>
> —Hurley, S.D., truck driver Jimmie Lee Williams, 49, was arrested near Houston, Texas, in connection with the death of trucker Richard Dale Kiniken [sic] on Interstate 80 in April.

The other article appeared in the Aurora News-Register on February 28, 1990, and detailed Williams' pretrial motions for change of venue and to exclude, in limine, testimony regarding the incident reconstruction. It is significant that the articles Williams singles out as most prejudicial—the one involving the county board dispute and the one bearing the "Williams enters plea of guilty" headline—appeared on November 22, 1989, and June 14, 1989, respectively, 3 1/2 and 9 months before the trial. See *State v. Bradley*, 236 Neb. 371, 461 N.W.2d 524 (1990) (change of venue not warranted where only five articles appeared in the 4 months immediately preceding trial).

The record of the voir dire examination details the care taken and ease had in seating jurors, and does not support Williams' assignment of error in this regard. Although as many as 35 of the 40 venirepersons called in the case had been exposed to media accounts, only one professed an inability to put what she

had read or heard aside, and she was excused for cause. Four of the jurors actually sworn to serve were specifically questioned about publicity; all either had not formed opinions or were willing to set their opinions aside. In light of these reassurances, the failure to grant a change of venue was not an abuse of discretion. See *State v. Boppre, supra.*

Williams claims error in that the trial court failed to sustain his cause challenge as to certain venirepersons. The only argument offered in support of this assignment is the repetition of the assignment with a citation to the bill of exceptions at page 190, line 12, where Williams challenged venireperson Hansen. However, following Hansen's statement that he could be fair and impartial, Williams did not renew his cause challenge or insist on a ruling on his earlier challenge. Failure to insist on a ruling on an objection waives the objection. *State v. Nowicki, ante* p. 130, 474 N.W.2d 478 (1991). Logic dictates that the same principle would apply to a failure to insist on a ruling on a challenge for cause. The most logical inference from the defendant's silence is that he was satisfied that the juror had rehabilitated himself by professing his impartiality, and the defendant was withdrawing his challenge.

Williams was granted 12 peremptory challenges. Neb. Rev. Stat. § 29-2005 (Reissue 1989) grants that number of challenges to a defendant charged with a crime punishable by death or imprisonment for life. However, he now claims that he should have been awarded six additional challenges, for the count charging him with use of a weapon in the commission of a felony.

The defendant makes much of the fact that the charge of use of a weapon was not part of the original complaint. However, he ignores the fact that the joinder of the two counts took place by means of the filing of the second amended complaint before any proceedings were had in the case. Williams also ignores the law of joinder in Nebraska, which focuses not upon the procedural aspects of the individual charges, but upon whether the separate offenses charged arose from the same transaction. See Neb. Rev. Stat. § 29-2002(1) (Reissue 1989). The murder count and the use of a weapon to commit a felony were properly joined because they arose out of the same act or transaction,

and it is wholly irrelevant to the issue of the propriety of their joinder whether the documents charging each offense were filed separately or contemporaneously.

Where, as here, two or more offenses are properly joined, a trial court does not err in limiting the defendant to the number of peremptory challenges statutorily available for the most serious of the offenses. "[A] defendant is not entitled to additional peremptory challenges because the indictment charges separate offenses in separate counts." *State v. Benzel*, 220 Neb. 466, 475, 370 N.W.2d 501, 509 (1985).

Williams assigns as error the admission of exhibits 13, 18, 19, 21, 23, 29, 30, 31, and 32. The only meaningful argument made in support of the assignment of error relates to exhibit 13, the T-shirt Kinikin was wearing when he was killed. With regard to the other exhibits, Williams simply asserts that "no foundation or relevance was made prior to their respective evidentiary introduction." Brief for appellant at 31.

The assignment of error with regard to the other exhibits is not properly presented in this court. Williams' entire argument in this respect is as follows:

> Likewise, Appellant objects to the introduction of Exhibits 18, 19, 21, 23, 29, 30, 31, and 32 as no foundation or relevance was made prior to their respective evidentiary introduction [citations to bill of exceptions for location and admission of each exhibit]. *United States v. Blackburn*, 389 F.2d 93 (6th Cir. 1968).

Brief for appellant at 31. "This court will not consider assignments of error which are not discussed in the brief." *State v. Spiegel, ante* p. 233, 234, 474 N.W.2d 873, 875 (1991).

Even if Williams had properly presented his arguments about foundation and relevance, there was no error in receiving the exhibits in evidence. Exhibit 21 was identified by the State's firearms expert as a "British .303 No. 4 Mark I rifle," which, defendant's wife testified, "look[ed] exactly like the gun" Williams had. She testified that she was present when he purchased the gun and that the serial number on the rifle he bought was 13592, which agreed with the serial number on the exhibit.

Exhibit 23 was identified by the expert as a box of

ammunition for the rifle, which, defendant's wife testified, had come from her and Williams' house and which she had mailed to the State's investigator.

Exhibits 18 and 19 are photos of the Shelton-Kenesaw exit off Interstate 80. Defendant's wife testified that she pulled the truck off the Interstate at the exit depicted in the photographs, and the State's investigator testified that the photos showed the exit and the location of the rifle when he found it.

Four of the exhibits, 29, 30, 31, and 32, were relevant because they showed where the rifle was found and the condition it was in at the time and were properly identified by the State's investigator.

Finally, exhibit 13, Kinikin's T-shirt, was not received solely to "inflame the passions of the Jury as it contained no probative evidentiary force," as Williams contends. Brief for appellant at 31. Rather, it showed the entry and exit sites of the bullet. Also, when considered along with the State's investigator's testimony, it served to show the distance at which the fatal shot was fired and tended to negate Williams' self-defense claim. The investigator testified that the rifle deposited powder and lead on a cloth surface when he test fired it at that surface at a distance of 4 feet or less. He further testified that he tested the T-shirt for powder and lead residue and found none. The T-shirt was evidence that the shot that killed Kinikin was fired from more than 4 feet away.

Error is assigned in the giving of the following, instruction No. 17, relating to the claimed defense of self-defense:

> An element in this case is that the defendant did not act in self-defense. The defendant did not act in self-defense if the state proved beyond a reasonable doubt that any one of the following did not occur:
>
> (1) Richard Dale Kinikin threatened serious bodily harm; or,
>
> (2) The defendant neither consented to any such use of force against him nor provoked any such use with the intent of using deadly force in response; or,
>
> (3) The defendant reasonably believed that his use of deadly force was immediately necessary to protect him against serious bodily harm; or

(4) Before using deadly force the defendant either tried to get away or did not try because he reasonably did not believe he could do so in complete safety.

The fact that the defendant may have been wrong in estimating the danger does not matter so long as there was a reasonable basis for what he believed and he acted reasonably under the circumstances as they existed at the time.

In considering claimed error regarding an instruction, " '[a]ll of the instructions given must be read together, and if, taken as a whole, they correctly state the law, are not misleading, and adequately cover the issues supported by the pleadings and the evidence, there is no prejudicial error necessitating a reversal.' " *State v. Johnson*, 236 Neb. 831, 842, 464 N.W.2d 167, 175 (1991).

Williams argues that instruction No. 17 misstates the law in two ways. First, he argues that the controlling statute, Neb. Rev. Stat. § 28-1409 (Reissue 1989), requires that self-defense be evaluated from the defendant's point of view, whereas instruction No. 17 compels the jury to evaluate the evidence of what the "other person" (in this case Kinikin) did. Second, he argues that subparagraph (4) of instruction No. 17 requires that the defendant attempt retreat, whereas § 28-1409 requires only that the defendant reasonably believe he could retreat in safety and does not require the defendant actually to attempt retreat. Additionally, he argues that the instruction is constitutionally infirm in that it shifts the burden of proving self-defense onto him and in that it is vague in its use of double negative language.

Defendant's first argument regarding whose point of view is important fails upon a full reading of the instruction. Whether Kinikin threatened Williams with serious bodily harm must be viewed in the eyes of the beholder—the last paragraph of the instruction permits the defendant to have been wrong in estimating his danger as long as there was a "reasonable basis for what he believed."

The instruction did not require the jury to find that Williams attempted to retreat. It merely required that defendant either tried to retreat *or* did not try because he (defendant) reasonably did not believe he could do so in complete safety.

The instruction of which complaint is made did not shift the burden of proving self-defense onto the shoulders of the defendant. Any hint that instruction No. 17 suggests such a position is nullified by instruction No. 7, which defines as an element of the charged offense of first degree murder, and of the lesser-included offenses of second degree murder and manslaughter, that "[Williams] did not act in self-defense when he killed Richard Dale Kinikin," and places upon the State the burden of proving each element beyond a reasonable doubt, which elements include the element of "no self-defense."

Williams' argument that the instruction is vague because it employs double negative language is without citation to authority and without meaningful exposition. Defendant simply states that the instruction is capable of "more than a single construction." Brief for appellant at 26. He does not suggest what alternative construction might be reached. A plain reading of the instruction shows that it is not vague or misleading. While it is drafted in negative rather than affirmative terms, this style is necessary in order to preserve the proper placement of the burden of proof. Read as a whole and in light of the other instructions, the attacked instruction does not misstate the law, is not misleading, and is not constitutionally infirm, and his assignment as to this instruction is without merit.

Finally, Williams' objection to the use of a victim impact statement is wholly without merit. In the first place, Williams received the minimum sentence, life imprisonment, considering that probation was obviously out of the question. Second, he relies on *Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987), in which the U.S. Supreme Court held that victim impact statements were not admissible before a jury making a capital sentencing decision. Williams' argument obviously refers to a letter found in the presentence investigation report from a coworker of the victim Kinikin, in which she described him as a hardworking employee who was easy to work with, and she stated he would be greatly missed by his friends and associates.

The State argues that *Booth* is inapplicable to noncapital cases and to sentencing determinations made, as under

Nebraska law, by a judge. See *State v. Joubert*, 235 Neb. 230, 455 N.W.2d 117 (1990). However, we need decide nothing based on *Booth* because that case has been overturned by the U.S. Supreme Court in *Payne v. Tennessee*, ____ U.S. ____, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991).

All of the defendant's assignments of error are without merit, and the judgment of the district court is affirmed.

AFFIRMED.

STATE OF NEBRASKA, APPELLEE, V. RANDY SALYERS, APPELLANT.
480 N.W.2d 173

Filed February 14, 1992. No. 90-715.

1. **Judgments: Records.** Where there is a conflict between the record of a judgment and a verbatim record of the proceedings in open court, the latter prevails.
2. **Sentences: Probation and Parole.** In imposing sentence, the court should state with care the precise terms of the sentence which is imposed. This same rule applies to the terms of probation imposed upon a defendant.
3. **Probation and Parole.** The fixing of terms and conditions of probation is a judicial duty and function and cannot be delegated to anyone, including a probation officer.
4. **Sentences: Appeal and Error.** It is error for a trial court, when imposing a straight jail sentence, to permit or require a defendant to serve his or her sentence intermittently.
5. **Probation and Parole.** There is statutory authority for intermittent incarceration as a condition of probation.
6. **Statutes.** When statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning, so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning.
7. **Criminal Law: Statutes.** It is a fundamental principle of statutory construction that penal statutes are to be strictly construed, and it is not for the courts to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there.
8. **Legislature: Intent: Probation and Parole.** It is beyond the purview of this court to assume that the Legislature intended that Neb. Rev. Stat. § 47-502 (Reissue 1988) apply to probationers who are sentenced to intermittent sentences.

Appeal from the District Court for Platte County, JOHN C. WHITEHEAD, Judge, on appeal thereto from the County Court

for Platte County, LYLE WINKLE, Judge. Sentence vacated, and cause remanded with directions.

James C. Stecker, of Robak & Stecker, for appellant.

Don Stenberg, Attorney General, and Donald A. Kohtz for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Randy Salyers appeals certain terms of his 3-year probation, which was imposed after he entered a plea of guilty to an amended complaint charging him with third degree assault of his wife. As a term of probation, the defendant was also ordered to pay a $500 fine.

The defendant was originally charged with the felony offense of sexual assault in the first degree of his wife, which carries a penalty of not less than 1 nor more than 50 years' imprisonment. See Neb. Rev. Stat. §§ 28-319 and 28-105 (Reissue 1989). Pursuant to a plea agreement, Salyers entered a plea of guilty to assault in the third degree. On that charge, he could have been sentenced to 1 year in jail, fined $1,000, or both, since assault in the third degree is a Class I misdemeanor. See Neb. Rev. Stat. §§ 28-310 and 28-106 (Reissue 1989).

In summary, Salyers claims the trial court, in imposing probation, erred by (1) requiring the defendant to serve the first 40 days he is not working in the county jail and (2) prohibiting the defendant from entering bowling alleys. The defendant appealed the sentence imposed by the county court to the district court for Platte County, where the sentence was affirmed. The defendant then appealed to this court.

Because the condition of probation regarding Salyers' exclusion from bowling alleys is ambiguous, we vacate the defendant's sentence and remand the cause to the district court for Platte County with directions to remand the cause to the county court for resentencing of the defendant in accord with the rules set forth in this opinion.

Before the assault involved here, bowling was a common activity for both Salyers and his wife. The defendant was

involved in bowling league activities, having served as his league secretary and as an officer in the Columbus Men's Bowling Association in 1990. He had won several individual bowling championships in 1989 and 1990. Salyers' wife had worked in the Westbrook Lanes bowling alley in Columbus in 1985 when she and the defendant first met. At the time Mrs. Salyers was assaulted, she also bowled in a league.

On the night of February 28, 1990, the defendant and his wife were at the Boulevard Lanes bowling alley in Columbus, where they attended a party for a mutual friend. Salyers "had a few beers" in the bowling alley bar or lounge. He questioned his wife's fidelity to him. The defendant's wife became angry and went home alone.

When the defendant went home, he attempted to have sexual relations with his wife. When she refused, Salyers followed her into the bathroom, where he physically and sexually assaulted her. The wife's screams awakened the couple's 2-year-old son. Mrs. Salyers convinced the defendant to let her go to attend to their son. Salyers' wife ran from her husband and hid from him in her 11-year-old son's basement room. From her hiding place, Mrs. Salyers saw her husband searching for her with a shotgun. The defendant later said the shotgun was unloaded, but that his wife did not know that it was unloaded. He told the court he wanted to "scare" his wife "to come upstairs and talk with me." Salyers admitted he picked up the shotgun to "threaten" his wife.

The wife then went to her 15-year-old daughter's room and told her everything that had happened. The police were called. After evacuating other members of Salyers' family from the residence, police found the defendant passed out in his bed, where they arrested him.

There appear to be discrepancies between what the trial judge ordered in open court and the order of probation prepared by the probation officer. As an example, in the verbatim record, the trial judge, as a part of probation, ordered that Salyers spend 40 days in jail, to be served on weekend days when he did not have to work. In the written probation order, the defendant was ordered to spend 40 days in jail on weekends. In the written order, there was no provision excusing him from

jail on days of a weekend when he had to work. In the verbatim record, the defendant was ordered to "[s]tay out of all bars, including bowling alleys, 'cause apparently you do some drinking in bowling alleys. Or otherwise whose principle [sic] business is the sale of alcohol or a considerable amount of alcohol is being consumed on the premises." In the written order, it is stated that the defendant shall "[n]ot enter any place where alcohol is primarily served or sold, nor any bowling alleys for the period of probation without written permission of your Probation Officer."

We have held that where there is a conflict between the record of a judgment and a verbatim record of the proceedings in open court, the latter prevails. *State v. Temple*, 230 Neb. 624, 432 N.W.2d 818 (1988). We have also held that in imposing sentence, the court should state with care the precise terms of the sentence which is imposed. *Id.* This same rule applies to the terms of probation imposed upon a defendant.

In addition to the conflicts between the verbatim record and the written order of probation, there is ambiguity in some terms of Salyers' probation. As an example, is Salyers ordered to stay away from bowling alleys altogether? Or is the defendant prohibited from entering bowling alleys where there is a bar on the premises or a bar connected by a doorway to the bowling alley? Or is the defendant only ordered to stay out of the bars in a bowling alley?

We further note that in the written order of probation, Salyers must "[s]atisfy other conditions of which you are notified in writing by your Probation Officer which are reasonably related to reconstructing your behavior and the protection of society." Any condition imposed under this provision of a probation order would be improper. We remind sentencing judges that the fixing of terms and conditions of probation is a judicial duty and function and cannot be delegated to anyone, including a probation officer. See *Ensrud v. Ensrud*, 230 Neb. 720, 433 N.W.2d 192 (1988).

Salyers argues that his intermittent incarceration as a term of probation is erroneous. His reliance upon *State v. Texel*, 230 Neb. 810, 433 N.W.2d 541 (1989), for that position is misplaced. In *State v. Texel*, we held that it is error for a trial

court, when imposing a straight jail sentence, to permit or require a defendant to serve his or her sentence intermittently. We have found no statute authorizing a court to impose an intermittent jail sentence when a defendant is given a straight jail sentence. There is, however, statutory authority for intermittent incarceration as a condition of probation. Neb. Rev. Stat. § 29-2262 (Reissue 1989) provides:

> (2) The court, as a condition of its sentence, may require the offender:
>
> . . . .
>
> (b) To be confined *periodically* in the county jail or to return to custody after specified hours, but not to exceed (i) for misdemeanors, the lesser of ninety days or the maximum jail term provided . . . for the offense . . . .

(Emphasis supplied.)

The defendant argues that the intermittent incarceration imposed as a condition of his probation denies him the opportunity to reduce his sentence pursuant to Neb. Rev. Stat. § 47-502 (Reissue 1988), which provides:

> Any person sentenced to a city or county jail shall have his or her term reduced seven days for each twenty-one *consecutive* days during which he or she has not committed any breach of discipline or other violation of jail regulations. The reductions authorized by this section shall be granted at the end of each period of twenty-one days, with such periods to run consecutively from the date of confinement following sentencing.

(Emphasis supplied.)

The defendant contends that § 47-502 should be applied with equal force to probationers serving intermittent sentences as it is to inmates serving straight jail sentences.

In analyzing this issue, we note first that when statutory language is plain and unambiguous, no judicial interpretation is needed to ascertain the statute's meaning, so that, in the absence of a statutory indication to the contrary, words in a statute will be given their ordinary meaning. *State ex rel. Gaddis v. Gaddis*, 237 Neb. 264, 465 N.W.2d 773 (1991). It is a fundamental principle of statutory construction that penal statutes are to be strictly construed, and it is not for the courts

to supply missing words or sentences to make clear that which is indefinite, or to supply that which is not there. See *State v. Donaldson*, 234 Neb. 683, 452 N.W.2d 531 (1990).

Section 47-502 specifically applies to jail inmates who have served 21 consecutive days. It is beyond the purview of this court to assume that the Legislature intended that § 47-502 apply to probationers who are sentenced to intermittent sentences authorized by § 29-2262 and who serve their sentences on weekends in order to accommodate their work schedules.

In his second assignment of error, Salyers attacks the provision of his probation order that, he says, restricts him from entering bowling alleys. The defendant argues that his attendance at bowling alleys was not related to his crime, nor is it related to his rehabilitation. Salyers is mistaken on both counts.

Section 29-2262 provides:

> (1) When a court sentences an offender to probation, it shall attach such reasonable conditions as it deems necessary or likely to insure that the offender will lead a law-abiding life.
>
> (2) The court, as a condition of its sentence, may require the offender:
>
> . . . .
>
> (p) To satisfy any other conditions reasonably related to the rehabilitation of the offender.

Salyers had been drinking beer at a bowling alley before he went home and sexually assaulted his wife. The defendant was passed out on his bed when he was found by police shortly after he had assaulted his wife. In sentencing the defendant, the trial judge remarked about Salyers' 10-year history with alcohol. The court noted, and Salyers agreed, that in 1980 the defendant went to Methodist Hospital Eppley Center in Omaha for inpatient treatment. He was diagnosed as suffering from chronic alcoholism. Salyers left without completing treatment and without permission because he "didn't want to hang around there any more." The court had also reviewed the defendant's alcohol-related offenses. The defendant's record of alcohol-related offenses began in 1971 when he was fined for

being a minor in possession of alcohol. Salyers was convicted of driving while under the influence of alcoholic liquor in 1979. In 1981, the defendant was placed on probation for 1 year and incarcerated for 90 days for obstructing a peace officer. Police officers had to physically subdue Salyers. The officers became involved with Salyers after the defendant, who was intoxicated, got into a fight with his father in their home. Also in 1981, Salyers was given a year's probation and 90 days in jail for the unauthorized use of a propelled vehicle. The defendant admitted to drinking the night of that crime. As part of his probation in 1981, Salyers was required to attend Alcoholics Anonymous meetings for 6 months.

Following the assault on his wife, Salyers was evaluated as a "problem drinker." In sentencing the defendant, the trial court told Salyers, "[Y]our own drinking is when you get in the insane jealous moods." The court told the defendant, "[A]pparently you do some drinking in bowling alleys." It was in a bowling alley bar or lounge on February 28 that Salyers had drunk beer before going home and assaulting his wife.

It is obvious that in fixing the terms of Salyers' probation, the sentencing court was concerned with Salyers' being a "problem drinker." It is also obvious that Salyers enjoyed drinking with his friends in bowling alleys. The availability of alcoholic beverages there apparently tempted Salyers to drink. Under the circumstances of this case, drinking in a bowling alley directly related to Salyers' assaulting his wife. Since bowling alleys are where Salyers did some of his drinking, it can be said that a restriction of the defendant's attendance at bowling alleys is related to the rehabilitation of the defendant.

Although the trial court needs to be more precise in setting forth its conditions of probation, the defendant's argument that no restriction should be placed upon his entering a bowling alley is without merit.

We vacate the sentence of the defendant and remand the cause to the district court for Platte County with directions to remand it to the county court with instructions to resentence the defendant.

SENTENCE VACATED, AND CAUSE REMANDED WITH DIRECTIONS.

GRANT, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. CLIFTON L. POPE, APPELLANT.

480 N.W.2d 169

Filed February 14, 1992. No. 90-889.

1. **Criminal Law: Investigative Stops: Police Officers and Sheriffs: Probable Cause.** The test to determine whether an investigative stop is justified is whether the police officer has a reasonable suspicion based on articulable facts which indicate that a crime has occurred, is occurring, or is about to occur and that the suspect may be involved.
2. _____: _____: _____: _____. In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances must be taken into account.
3. **Motions to Suppress: Appeal and Error.** On review, a trial court's ruling on a motion to suppress will be upheld unless the findings of fact inherent in the ruling are clearly erroneous.
4. **Search and Seizure.** Although the fact that an individual is in police custody is an important consideration in determining the voluntariness of the consent to search, such factor, standing alone, does not invalidate the consent to search as long as the consent was otherwise voluntarily given.

Appeal from the District Court for Douglas County: JAMES A. BUCKLEY, Judge. Affirmed.

Thomas M. Kenney, Douglas County Public Defender, and Brian S. Munnelly for appellant.

Don Stenberg, Attorney General, and Jim Elworth for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

Defendant, Clifton L. Pope, was convicted by the district court, sitting without a jury, of unlawful possession of a controlled substance. He was sentenced to 20 months' to 5 years' imprisonment, with credit given for time served. Defendant timely appealed, assigning a single error: The "District Court erred in overruling the Defendant's motion to suppress the fruits of the stop and subsequent arrest of the Defendant." A timely objection was made at trial to the admission into evidence of the "fruits of the illegal stop." We affirm.

The record shows the following: At 10:14 p.m. on December

8, 1989, two police officers on routine patrol saw a parked car, "partially out in the westbound traffic lane on Taylor Street," obstructing the flow of traffic west of 24th Street in Omaha. At the time, "there was a lot of traffic flow on Taylor Street." The area was described as "a high drug traffic area." The car was parked "two, two and a half feet" from the curb, and "[t]he flow of traffic was having difficulty due to this vehicle." Two men were seated in it. Defendant was in the front passenger seat. The officers saw the two men get out of the car and hurriedly walk away.

The officers parked their cruiser and walked toward the car, intending to "advise the parties to either pull the vehicle out from the position or just go ahead and pull it over to the side of the roadway so the traffic could flow." As the officers walked past the car, they saw that it was unlocked and that the keys were in the ignition. They testified that that was unusual for such a high crime area, frequented by pedestrians.

The officers caught up with the two men approximately 20 feet away from the car. The officers asked the two to move the car, but they replied that it was not their car and that it belonged to a woman in a nearby bar. The men stated they did not know the woman's name, only her nickname.

This first contact between the police and defendant was proper. The police were addressing an obvious traffic problem and sought to clear the way for traffic by having the car moved. When defendant and his companion said that they did not own the car and that they did not know the name of the owner, the police were then faced with a different problem. Defendant had just left a car that neither he nor his companion owned, and they did not know the name of the owner. The police knew that keys were in the ignition of the car and that the location was a high crime area. At this point, the police knew objective facts constituting reasonable cause for a "stop and frisk." See *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The police conducted a pat-down search. Defendant cannot successfully contend the pat-down search was illegal.

The pat-down search of defendant and the other man disclosed no weapons. While one officer was checking the two men's identification, the other went to look for registration

papers in the car. About this time, two more officers joined the officers already at the scene. Two officers looked through the window and immediately saw that the glove compartment was open and that several packages of cellophane and numerous burnt matches were on top of the open glove compartment door. The officers had much training and experience in drug enforcement, and they testified the facts before them made them suspect that someone had been consuming crack cocaine in the car.

After observing the cellophane and the matches, one officer approached defendant and questioned him. At this point, defendant was, in effect, seized. The officer testified that defendant was not "free to go." The stop had developed into an investigation.

We have held:

> The test to determine whether an investigative stop is justified is whether the police officer has a reasonable suspicion based on articulable facts which indicate that a crime has occurred, is occurring, or is about to occur and that the suspect may be involved. . . . In determining what cause is sufficient to authorize police to stop a person, the totality of the circumstances must be taken into account. . . . The assessment of the totality of the circumstances includes all of the objective observations and considerations, as well as the suspicion drawn by a trained and experienced police officer by inference and deduction that the individual stopped is, has been, or is about to be engaged in criminal behavior.

State v. Pillard, 235 Neb. 642, 646, 456 N.W.2d 755, 758 (1990).

In this case, experienced officers had properly looked inside the car in an effort to determine the ownership of the car and saw physical items in plain view. Those items indicated that illegal drugs had been consumed in the car. The items were positioned directly in front of the seat in the car that the officers knew defendant had just left. The information could be used by the officers because it was obtained pursuant to the "plain view" doctrine. The officers lawfully made their initial intrusion into the car; the incriminating evidence was discovered inadvertently; and it was immediately apparent to

the trained officers that the items they saw could be evidence of a crime. See *State v. Brown*, 232 Neb. 224, 439 N.W.2d 792 (1989). The investigative stop was fully justified and was legally proper.

One of the officers asked defendant if defendant had any drugs on his person and if he had used any drugs that evening. Defendant replied negatively to both questions. The officer then asked defendant if the officer could search him for controlled substances. Defendant told the officer to go ahead. The officer asked defendant to turn around and unbutton his overcoat. Defendant did so and opened the coat.

The officer reached into defendant's overcoat and found a cellophane wrapper in the left inside breast pocket. The wrapper contained a substance that was later determined to be a large rock of crack cocaine. The officer then formally placed defendant under arrest and field tested the substance. Defendant accused the officer of planting the cocaine in his pocket and denied that the cocaine belonged to him.

The officers transported defendant to the police station, where they strip searched and interrogated him. Defendant was advised of his rights under *Miranda*, and an officer recorded defendant's responses stating that he understood his rights. Defendant then made a statement, in which he admitted that he had given consent to the search and had voluntarily opened his coat. The interview concluded about 11:25 p.m.

When reviewing the correctness of a trial court's ruling on a motion to suppress, an appellate court will not reweigh the evidence or resolve conflicts in the evidence, but will uphold the trial court's findings of fact inherent in the court's ruling unless these facts are clearly erroneous. See, *State v. Melton, ante* p. 790, 478 N.W.2d 341 (1992); *State v. Bowen*, 232 Neb. 725, 442 N.W.2d 209 (1989). In determining whether a trial court's findings on a motion to suppress are clearly erroneous, an appellate court does not reweigh evidence or resolve conflicts therein, but takes into consideration that the trial court has observed the witnesses testifying in regard to the motion to suppress. *State v. Melton, supra.*

Neither a warrant nor probable cause is required for a consensual search, but the State must prove that the consent

was freely and voluntarily given. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). Pursuant to the 4th and 14th amendments to the U.S. Constitution and article I, § 7, of the Nebraska Constitution, a citizen has a right to be free from an unreasonable search and seizure. "[I]f police [have] acted without a search warrant, the State has the burden of proof that the search was conducted under circumstances substantiating the reasonableness of such search or seizure." *State v. Vrtiska*, 225 Neb. 454, 461, 406 N.W.2d 114, 120 (1987).

We discussed the requirements of voluntary consent in *State v. Prahin*, 235 Neb. 409, 455 N.W.2d 554 (1990), where defendant had been stopped for speeding. Prahin objected to a subsequent search, on the basis that although he gave consent, his consent was not voluntary. Prahin argued that he was in custody at the time he gave his consent to the search, and, therefore, his consent was involuntary. Pope was in custody in this case. In *Prahin*, we held, "Although the fact that an individual is in police custody is an important consideration in determining the voluntariness of the consent to search [citation omitted], such factor, standing alone, does not invalidate the consent to search as long as the consent was otherwise voluntarily given." *State v. Prahin, supra* at 416, 455 N.W.2d at 560.

In this case, defendant was in custody when he gave his consent, because at that point he was not free to leave. There is no evidence, however, that the officer coerced, threatened, or made promises to the defendant. Defendant not only consented, but admitted in his statement that he opened his coat for the officer. Defendant's consent to the search of his person, in this case, was voluntarily given. We hold that the evidence fully supports the trial court's order denying defendant's motions to suppress both his statements and the physical evidence obtained from his person and the trial court's overruling defendant's objections to their admission at trial. Defendant's assignment of error is without merit.

AFFIRMED.

RONALD A. MILLER, APPELLEE, V. GOODYEAR TIRE & RUBBER COMPANY AND THE TRAVELERS INSURANCE COMPANY, APPELLANTS.

480 N.W.2d 162

Filed February 14, 1992. No. 90-1166.

1. **Workers' Compensation: Appeal and Error.** The findings of fact made by the Nebraska Workers' Compensation Court on rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly erroneous.
2. **Workers' Compensation: Evidence: Appeal and Error.** In testing the sufficiency of the evidence to support findings of fact made by the compensation court after rehearing, the evidence must be considered in the light most favorable to the successful party.
3. **Trial.** Determination of causation is ordinarily a question for the trier of fact.
4. **Workers' Compensation.** A preexisting disease and an accident may combine to produce a compensable disability under the Workers' Compensation Act.
5. _____. A preexisting disease and an aggravation of that disease may combine to produce a compensable injury.
6. **Statutes: Legislature: Intent.** As a series or collection of statutes pertaining to a certain subject matter, statutory components of an act which are in pari materia may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.
7. **Statutes: Judicial Construction: Legislature: Presumptions: Intent.** When a judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court's interpretation.
8. **Workers' Compensation.** Neb. Rev. Stat. § 48-151(3) (Reissue 1988) means that the conditions of the employment must result in a hazard which distinguishes it in character from employment generally.

Appeal from the Nebraska Workers' Compensation Court. Affirmed.

Richard D. Sievers, of Bruckner, O'Gara, Keating, Sievers & Hendry, P.C., for appellants.

Rod Rehm, P.C., for appellee.

HASTINGS, C.J., WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

GRANT, J.

This is an appeal from a decision of a three-judge panel (one judge dissenting) of the Workers' Compensation Court

awarding plaintiff-appellee, Ronald A. Miller, 6⁶/₇ weeks' temporary total disability and certain medical expenses. Defendants, Goodyear Tire & Rubber Company, Miller's employer, and The Travelers Insurance Company, Goodyear's insurer, have appealed. Appellants assign five errors, which may be summarized to allege that the compensation court erred (1) in finding that "the Appellee's transient acantholytic dermatosis was an occupational disease where the preexisting disease was not an occupational disease as required [by] Neb. Rev. Stat. §48-151 (4) (Reissue 1988)" and (2) in finding that "the Appellee's transient acantholytic dermatosis was a compensable occupational disease when there was no evidence that the only known aggravating factor, to-wit [sic]: heat or sweat, was unique or peculiar to Appellee's employment with Goodyear." We affirm.

The findings of fact made by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside unless clearly erroneous. *Phipps v. Milton G. Waldbaum & Co., ante* p. 700, 477 N.W.2d 919 (1991); *Roan Eagle v. State*, 237 Neb. 961, 468 N.W.2d 382 (1991). In testing the sufficiency of the evidence to support findings of fact made by the compensation court after rehearing, the evidence must be considered in the light most favorable to the successful party, *Phipps v. Milton G. Waldbaum & Co., supra*, in this case, the appellee, Miller.

Miller started work for Goodyear in 1976. At that time he had never been treated for a skin disorder. From 1976 to 1989, Miller worked in the hose department at Goodyear making radiator hose. His job, described as "hose pulling," consisted of dipping raw rubber in various chemicals and loading it on mandrels. The rubber was then baked for approximately 15 minutes to a temperature of over 300 degrees. After the rubber was cooked, Miller removed the rubber from the oven and pulled the rubber off the various mandrels, in rotation. Miller testified, "You just keep going from one pot to another, and you just rotate them back and forth. Or if you are on one single pot, you just take that one end . . . so it's just kind of back and forth."

When asked if he got breaks away from the hot environment, Miller testified, "[I]f you can beat the time and get done before that, they do have a picnic table we sit down on, but it's right in the area. There's no cool — I mean, they have a cool room, but that's basically for your lunches."

Miller testified that the job was "a hot physical job." Near the ovens, the temperature reached as high as 125 to 128 degrees, and the ovens and the rubber gave off heat. The workers were dripping wet with sweat at all times of the year. They regularly came into contact with the chemicals. Conditions had been the same since Miller started working for Goodyear in 1976.

While working in this heat, Miller wore protective clothing, including thick cotton sleeves, worn from the wrist to above the elbow, and gloves. He wore a headband to keep the sweat out of his eyes.

Miller was exposed to three different chemicals when he was pulling hose. Goodyear provided information, admitted into evidence, about these chemicals. The information indicated that all three chemicals could cause skin irritation. The first product, cyclohexanone, "is a moderate skin irritant and repeated or prolonged exposure can cause irritation or dermatitis." (Emphasis omitted.) The information on the second chemical, Ucolic, stated that it causes eye and skin irritation. The third product, "hose bloom," "may irritate the skin of some individuals if prolonged and repeated contact is encountered." (Emphasis omitted.)

The expert witnesses, the dermatologists who treated or examined Miller, could not evaluate the contributing effect of the various chemicals on Miller. Dr. Rodney Basler's opinion was that "patch testing" to try to determine the effect of the individual chemicals was "of no diagnostic value whatsoever in dermatologic conditions in which the entire environment is incriminated in aggravating an inflammitory [sic] dermatosis." Dr. Basler reaffirmed, "Again it is the overall work environment which contributed to the aggravation of Mr. Miller's underlying disease."

Dr. Suzanne Braddock, another dermatologist, wrote that "to confirm that *chemicals* are *directly* responsible we would

have to [do a] 'patch test.' " (Emphasis that of Dr. Braddock.)

In 1988, Miller began to develop skin problems. The problems began with a rash in the area of his headband. The rash then spread to his arms, chest, back, and legs. The rash was itchy and bleeding. In November 1988, Miller went to the plant physician, who attempted to treat the problem for about 2 weeks before sending Miller to dermatologists in December 1988. The dermatologists did a biopsy on December 16, 1988, and the results were consistent with transient acantholytic dermatosis (TAD), also known as Grover's disease. The dermatologists prescribed various medications, including Accutane, steroids, and prednisone, to treat the rash through the spring and summer of 1989, but the medications were ineffective.

TAD is a relatively rare disease. Dr. Basler testified that the biochemical background of TAD is unknown in the scientific community, but that it is usually associated with heat and sweating. Basler testified that he believed that Miller's TAD "may have been instigated or originated with a heat-related experience at work," but that "it would be impossible to say that that's definitely what caused the disease."

Basler testified as a witness for defendants and testified that the TAD was aggravated by Miller's work at Goodyear. The following dialogue took place:

> Q Doctor, in your opinion, was there an aggravation of the underlying TAD that occurred when Mr. Miller would return to work at the Goodyear plant?
>
> A I do believe that.
>
> Q Now, when you use the term "aggravation" in responding to my question, what do you mean by "aggravation"?
>
> A During periods of time when he — we had cleared him up, from being away from his job and using the internal medications, particularly the cortisone, the steroid-type preparations, when he would return to work, I would ask him to return to see me within a week, and he would return with the same type of lesions that he had initially that were red, itching, sometimes fluid-filled, weeping, sometimes crusted.

In July 1989, Miller's condition was so bad that Dr. Basler insisted Miller leave the plant for a time. At times his body was covered with blistered, bleeding lesions. Miller said he had trouble sleeping when the rash was bad. He described his legs, arms, and chest as "raw," and he was unable to get haircuts because his head was covered with the rash. "I would just itch. Back then it was really bad. It was to the point where I couldn't stand it." Miller was away from work from July 10 to July 24, 1989. During that time he was taking steroids, and his condition cleared up completely.

The day Miller returned to work, he started in the hose department at his old job. By 11 a.m., his rash returned. Miller only worked in the hose department a few days before Goodyear arranged to temporarily transfer him to another job. His condition cleared slightly.

The doctors wanted to see if Miller's condition would improve without drugs if he were away from the plant. Miller was off work from November 1 to December 13, 1989. During this time, he used only a salve to soothe the itching. His skin condition cleared.

When Miller returned to Goodyear in December 1989, he was assigned to a job packing belts, which was outside the hose department. Miller earned 50 to 60 cents an hour less than he did in the hose department. The conditions were cooler in the packing job, and Miller did not come in contact with any chemicals. He did not sweat much in the packing department. Miller developed a minor rash, but "[it was] nothing like it ha[d] been in hose."

Miller worked packing belts until June or July 1990, when he was moved to another job at Goodyear. The conditions were a little hotter than in the packing job, and the pay was comparable.

Since Miller left the hose department, he has not sought help for his rash other than to obtain a salve that he uses "when [he] need[s] it." He has not suffered a major outbreak since he left the hose department, with the exception of an outbreak on his arm after he momentarily entered a chemical room.

After the rehearing, the compensation court found that there was "ample evidence with respect to the issue of causation" and

that plaintiff was entitled to benefits. In so finding, the court denied defendants' contentions that the heat in Miller's work environment was a condition common to many employments and that Miller's petition should be denied because this case represents only the aggravation of a preexisting dermatosis. Determination of causation is ordinarily a question for the trier of fact. *Kidd v. Winchell's Donut House*, 237 Neb. 176, 465 N.W.2d 442 (1991); *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990).

With respect to appellants' first summarized assignment of error, the compensation court held as follows: "We are persuaded that the employment conditions of the plaintiff at [Goodyear] aggravated his preexisting dermatosis to the point that the plaintiff was required to be off work . . . and to incur the medical expenses ordered to be paid." We agree with the majority of the compensation court panel.

The law is well settled that a preexisting disease and an accident may combine to produce a compensable disability under the Workers' Compensation Act. See, e.g., *Gilcrest Lumber Co. v. Rengler*, 109 Neb. 246, 190 N.W. 578 (1922) (accident combined with existing syphilis resulted in compensable injury); *Chatt v. Massman Construction Co.*, 138 Neb. 288, 293 N.W. 105 (1940) (long-existing rheumatism combined with a slip and fall into the Missouri River resulted in compensable injury); *Engel v. Nebraska Methodist Hospital*, 209 Neb. 878, 312 N.W.2d 281 (1981) (congenital spondylolysis combined with lifting accident resulted in compensable injury); *Kidd v. Winchell's Donut House, supra* (preexisting diabetes combined with a blow to the eye socket resulted in compensable injury).

Similarly, a preexisting disease and an aggravation of that disease may combine to produce a compensable injury, as we held in *Riggs v. Gooch Milling & Elevator Co.*, 173 Neb. 70, 74, 112 N.W.2d 531, 533 (1961), where we stated:

> The law of this state has consistently recognized that the lighting up or acceleration of preexisting conditions by accident is compensable. We see no difference in principle in the situation before us. A disability brought about by employment conditions and a preexisting weakness or

> disease, may be compensable if the conditions bringing it about are characteristic of and peculiar to the employment and do not result in a common disease to which the general public is exposed.

In *Riggs*, the claimant's medical testimony showed that "the inhaling of wheat dust in large quantities over a long period of time produces an irritation of the lungs and bronchial tree and *an aggravation of an existing abnormal condition* which may result in an emphysema reaching a disabling stage." (Emphasis supplied.) *Riggs, supra* at 75, 112 N.W.2d at 534.

We discussed the degree of proof required in a preexisting disability case in *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990). We expressly disapproved a heightened standard of proof when a preexisting disease or condition was involved. We stated:

> [A] workers' compensation claimant may recover when an injury, arising out of and in the course of employment, combines with a preexisting condition to produce disability, notwithstanding that in the absence of the preexisting condition no disability would have resulted. Also, we stated in *Spangler* [*v. State*, 233 Neb. 790, 448 N.W.2d 145 (1989)]: "To sustain an award in a workers' compensation case involving a preexisting disease or condition, it is sufficient to show that the injury resulting from an accident arising out of and in the course of employment and the preexisting disease or condition combined to produce disability [citation omitted], or that the employment injury aggravated, accelerated, or inflamed the preexisting condition [citations omitted]." 233 Neb. at 795, 448 N.W.2d at 149.
>
> Although a claimant with a preexisting disability or condition may face various obstacles, both medical and legal, and must satisfy the statutory requirements for an award under the Nebraska Workers' Compensation Act, an enhanced degree of proof, establishing a cause-and-effect relationship between a work-related injury and consequent disability, is not among a claimant's burdens for obtaining an award under the Nebraska Workers' Compensation Act.

Heiliger, supra at 468, 461 N.W.2d at 572.

If the aggravation clause of Neb. Rev. Stat. § 48-151(4) (Reissue 1988) requires that the claimant prove the preexisting disease is occupational, the aggravation clause adds nothing to the statute. Occupational diseases are already compensable according to § 48-151(4), which states, "The terms shall include disablement resulting from occupational disease arising out of and in the course of the employment in which the employee was engaged and which was contracted in such employment." Since disability arising from occupational diseases is already compensable, the aggravation clause adds nothing, with the possible exception of a situation in which the claimant's underlying condition or disease is caused by his work with firm A, the condition is aggravated by his work with firm B, and the claimant wishes to receive benefits from firm B. This set of facts would require the application of Neb. Rev. Stat. § 48-128 (Reissue 1988), which provides, in detail, for a Second Injury Fund.

Appellants' interpretation of the aggravation clause is not compatible with the language of § 48-128, which provides, in part,

> If an employee . . . has a preexisting permanent partial disability whether from compensable injury *or otherwise* . . . the employer at the time of the last injury shall be liable only for the degree or percentage of disability which would have resulted from the last injury had there been no preexisting disability.

(Emphasis supplied.) If we allowed compensation only for the aggravation of occupational conditions, then all preexisting permanent partial disabilities would be from "compensable injury" and the "or otherwise" language would be meaningless. Additionally, § 48-128 goes on to define preexisting permanent partial disability as "any preexisting permanent condition, *whether congenital or the result of injury or disease*, of such seriousness as to constitute a hindrance or obstacle to obtaining employment . . . ." (Emphasis supplied.) If we adopt the appellants' interpretation, §§ 48-128 and 48-151(4) of the Workers' Compensation Act are contradictory. Such a result should be avoided, if possible. We stated in *Indian Hills Comm.*

Ch. v. County Bd. of Equal., 226 Neb. 510, 518, 412 N.W.2d 459, 465 (1987), " '[A] series or collection of statutes pertaining to a certain subject matter, statutory components of an act, which are in pari materia, may be conjunctively considered and construed to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible.' "

For the past 30 years, since *Riggs v. Gooch Milling & Elevator Co.*, 173 Neb. 70, 112 N.W.2d 531 (1961), we have interpreted the Nebraska Workers' Compensation Act not to require proof that a preexisting condition was occupational before allowing recovery for a work-related aggravation of that condition. When a judicial interpretation of a statute has not evoked a legislative amendment, it is presumed that the Legislature has acquiesced in the court's interpretation. *Nelson v. Dolan*, 230 Neb. 848, 434 N.W.2d 25 (1989); *Mayfield v. Allied Mut. Ins. Co.*, 231 Neb. 308, 436 N.W.2d 164 (1989).

Appellants' first summarized assignment of error is without merit.

With regard to appellants' second summarized error, that is, that the panel erred in finding that the only known aggravating factor in Miller's condition was unique or peculiar to Miller's employment with Goodyear, we also agree with the panel's determination in that respect.

Appellants contend: "It is difficult to see how the heat in the plant would distinguish this occupation from a myriad of other occupations. Most work performed in the out-of-doors in a Nebraska summer causes the average worker to sweat, sometimes profusely." Brief for appellants at 19.

In this regard, the majority of the panel found as follows: "We have concluded that the excessive heat to which the plaintiff was exposed, which heat was sufficient to cause the plaintiff to drench his clothing with sweat, is a condition of the plaintiff's employment which distinguishes it in character from employment generally."

In making that finding, the panel majority did not mean "heat" in the abstract. The heat in which Miller worked was not just reflected in a high temperature, but that heat was only a part, albeit a large part, of the work environment. In

responding to a question posed by The Travelers, concerning the possibility of patch testing to determine if specific chemicals were causing Miller's problems, Dr. Basler stated in his March 6, 1990, report:

> In answer to specific questions posed by Mr. Paul A. Harold of the Traveler's, let me first answer that controlled setting exposure to chemicals of any type is of no diagnostic value whatsoever in dermatologic conditions in which the entire environment is incriminated in aggravating an inflammitory [sic] dermatosis. For that reason controlled exposure, specifically patch testing was not used . . . . Again it is the overall work environment which contributed to the aggravation of Mr. Miller's underlying disease.

Dr. Basler is of the opinion which lay common sense affirms, that the entire work environment is "incriminated" in aggravating Miller's condition.

The environment in which Miller worked cannot reasonably be said to be the same as the environment in which "a roofer, construction worker, carpenter, asphalt paver, garbage man, lifeguard, or tour guide at the zoo," brief for appellants at 19, would work. Rather than working in a confined area full of heat and chemicals, the workers referred to by appellants work in fresh outdoor air and at temperatures less than the temperatures to which Miller was continuously exposed.

The statutory requirement in § 48-151(3) is that the disease be "a disease which is due to causes and conditions which are characteristic of and peculiar to a particular trade, occupation, process, or employment . . . ." Section 48-151(4) includes the aggravation of a preexisting disease within the meaning of disease, so that a disease aggravated by conditions characteristic of and peculiar to a particular employment is likewise compensable.

In *Ritter v. Hawkeye-Security Ins. Co.*, 178 Neb. 792, 795, 135 N.W.2d 470, 472 (1965), we said:

> The requirement of the statute [§ 48-151(3)] is that the cause and conditions of the disease be characteristic of and peculiar to the employment and that the disease be other than an ordinary disease of life. The statute does not

> require that the disease be one which originates exclusively from the employment. The statute means that the conditions of the employment must result in a hazard which distinguishes it in character from employment generally. . . .
>
> . . . The evidence establishes that the cause and conditions of the disease are characteristic of and peculiar to the occupation of dishwashing and that dishwashing involves a hazard which is greater than that which occurs in employment generally.

Ritter was a dishwasher. The lower court had determined that plaintiff's disease was not characteristic of or peculiar to the plaintiff's occupation, but this court reversed that determination and held as set out above.

Similarly in this case, we affirm the panel majority's finding that the causes and conditions in this case are peculiar to Miller's occupation as a "hose puller."

Appellants' second summarized assignment of error is without merit.

Appellee's counsel is awarded a fee of $1,500 on appellee's fee in this appeal.

AFFIRMED.

BOSLAUGH, J., participating on briefs.

STATE OF NEBRASKA, APPELLEE, V. DONALD F. GRAY, APPELLANT.

479 N.W.2d 796

Filed February 14, 1992. No. 90-1182.

Motions to Dismiss: Directed Verdict: Waiver: Convictions: Appeal and Error. A defendant who moves for dismissal or a directed verdict at the close of evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict, but may challenge sufficiency of the evidence for the defendant's conviction.

Appeal from the District Court for Sarpy County, RONALD E. REAGAN, Judge, on appeal thereto from the County Court for Sarpy County, JEFFREY L. CAMPBELL, Judge. Judgment of District Court affirmed.

Thomas J. Garvey, Sarpy County Public Defender, and Robert C. Wester for appellant.

Don Stenberg, Attorney General, and Delores Coe-Barbee for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

SHANAHAN, J.

Donald F. Gray appeals his conviction during a bench trial in the county court for Sarpy County and sentence for third degree assault, see Neb. Rev. Stat. § 28-310(1)(b) (Reissue 1989), a Class I misdemeanor punishable by a maximum of 1 year's imprisonment, a $1,000 fine, or both, pursuant to Neb. Rev. Stat. § 28-106 (Reissue 1989), which prescribes no minimum sentence of imprisonment or fine for a Class I misdemeanor.

Section 28-310(1)(b) states in pertinent part: "A person commits the offense of assault in the third degree if he . . . [t]hreatens another in a menacing manner."

In the late hours of a July evening in 1989, the victim, a 9-year-old boy who was 4 feet tall and weighed around 120 pounds, was involved in playing darts at the River City Softball Complex with 28-year-old Gray, who was 5 feet 7 inches tall and weighed 184 pounds, a bodybuilder who had won the title of "Mr. Nebraska . . . collegiate." Also involved in the dart matches was Gray's friend, Tim Pool. While the trio played their dart games in the upper level of the complex, the victim's parents were downstairs with other family members. During one of the dart games, an apparent dispute occurred concerning the victim's contribution toward payment for the game. When Gray and Pool began to chase the victim around the upper level, the frightened victim ran to the men's room, went inside, and hid himself in a toilet stall, which he locked. Gray and Pool entered the men's room and beat on the door of the stall

containing the victim, but soon left. When the victim believed it was safe, he left the stall. At that point, Gray and Pool reentered the men's room. Gray picked up the victim and held the victim's legs as Pool grasped the victim around the waist. While the victim was "afraid," head down, and nearly vertical, Gray and Pool lowered the victim's head into a urinal to the point that the boy's head became wet from water in the urinal. Afterward, Gray and Pool left the victim sitting on the floor of the men's room and crying, and returned to the area where the dart games had been played. Thereafter, when the victim informed his parents about the incident, the victim's father and uncle confronted Gray, who admitted the events in the men's room. Officers from the Sarpy County Sheriff's Department appeared at the scene in response to a call from the manager of the complex.

The preceding account of the incident was, by and large, established through evidence presented by the State. At the conclusion of the State's case in chief, Gray moved for dismissal, contending that the State had failed to prove a prima facie case of assault. When the dismissal motion was overruled, Gray proceeded to testify, expressly and specifically contradicting the State's evidence that he held the victim aloft and then lowered the victim's head into the urinal. For the most part, Gray testified that it was Pool, not Gray, who lowered the victim into the urinal. At the conclusion of Gray's evidence and without Gray's renewal of a motion for dismissal, the State declined to offer rebuttal evidence. After summations by the lawyers, the court found Gray guilty of third degree assault, the charge and conviction involved in Gray's appeal. Later, after a presentence report, the county court, on September 21, 1990, sentenced Gray on the assault conviction—15 days' imprisonment and a $75 fine.

In Gray's appeal to the district court for Sarpy County, Gray's conviction and sentence were affirmed. In his appeal to this court, Gray claims: "1. The trial court erred as a matter of law by not dismissing at the close of Appellee's case. 2. The trial court erred and abused its discretion by imposing an excessive sentence which was disproportionate to the crime."

Although Gray contends that the State failed to prove a

prima facie case of assault and, hence, the court should have sustained Gray's dismissal motion at the end of the State's case in chief, both Gray and the State, in a knee jerk response to Gray's assignments of error without a careful examination of the record, overlook a fundamental and longstanding principle for appellate review: A defendant who moves for dismissal or a directed verdict at the close of evidence in the State's case in chief in a criminal prosecution, and who, when the court overrules the dismissal or directed verdict motion, proceeds with trial and introduces evidence, waives the appellate right to challenge correctness in the trial court's overruling the motion for dismissal or a directed verdict, but may challenge sufficiency of the evidence for the defendant's conviction. See, *State v. Tingle, ante* p. 558, 477 N.W.2d 544 (1991); *State v. Coburn*, 218 Neb. 144, 352 N.W.2d 605 (1984); *State v. Hellbusch*, 213 Neb. 894, 331 N.W.2d 815 (1983); *Henggler v. State*, 173 Neb. 171, 112 N.W.2d 762 (1962).

By introduction of evidence after the court's ruling on the dismissal motion, Gray has waived any appellate challenge to the correctness of the trial court's ruling on Gray's dismissal motion at the end of the State's case in chief. We have recounted some of the evidence to show that there was not a complete failure of proof on an essential element of the crime charged and thereby dispel any notion about availability of the plain error doctrine concerning sufficiency of evidence to support Gray's conviction. Also, the factual background for Gray's conviction supplies the setting for our considering Gray's claim that an excessive sentence was imposed on him.

In conjunction with Gray's claim that the county court imposed an excessive sentence, we have examined the presentence report on Gray, which discloses that he has had several encounters in the criminal justice system, including the following convictions: theft (1982); reckless driving (1984); drunk driving (1986); disturbing the peace (1987); drunk driving, which was Gray's second offense (arrest: August 19, 1989; conviction: May 10, 1990); and drunk driving, which was treated as Gray's second offense (arrest: January 3, 1990; conviction: May 10, 1990).

" ' "A sentence imposed within the statutory limits will not

be disturbed on appeal unless the sentencing court has abused its discretion in the sentence imposed." ' " *State v. Witt, ante* p. 400, 402-03, 476 N.W.2d 556, 558-59 (1991). Accord, *State v. Jameson, ante* p. 109, 474 N.W.2d 475 (1991); *State v. Staten*, 238 Neb. 13, 469 N.W.2d 112 (1991). We have also stated:

> [I]n considering a proper sentence, the trial court is not limited in its discretion to any mathematically applied set of factors. It is necessarily a subjective judgment and includes the observations of the sentencing judge as to the demeanor, attitude, and all facts and circumstances surrounding the life of the defendant.

State v. Stranghoener, 208 Neb. 598, 603, 304 N.W.2d 679, 682 (1981). Accord *State v. Witt, supra*.

In view of the foregoing, there is no abuse of discretion in the sentence imposed on Gray.

Therefore, the judgment of the district court, affirming Gray's county court conviction and sentence, is affirmed.

AFFIRMED.

IN RE INTEREST OF M.B. AND A.B., CHILDREN UNDER 18 YEARS OF AGE.

STATE OF NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. A.B., APPELLANT, AND N.F., APPELLEE AND CROSS-APPELLANT.

480 N.W.2d 160

Filed February 14, 1992. No. 91-443.

1. **Juvenile Courts: Jurisdiction.** The jurisdiction of the State in juvenile adjudication cases arises out of the power every sovereignty possesses as parens patriae to every child within its borders to determine the status and custody that will best meet the child's needs and wants.
2. **Juvenile Courts: Evidence: Jurisdiction.** If evidence of the fault or habits of a parent or custodian indicates a risk of harm to a child, the juvenile court may properly take jurisdiction of that child, even though the child has not yet been harmed or abused.
3. **Juvenile Courts: Jurisdiction: Intent.** It is not the intent or the purpose of the Nebraska Juvenile Code to require the separate juvenile court to wait until disaster has befallen a minor child before the court may acquire jurisdiction.

Appeal from the Separate Juvenile Court of Lancaster County: TONI G. THORSON, Judge. Affirmed.

Roger C. Lott for appellant.

Thomas R. Lamb, of Berry, Anderson, Creager & Wittstruck, for appellee N.F.

Linda S. Porter, Deputy Lancaster County Attorney, for appellee State.

Roberta S. Stick, guardian ad litem.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

WHITE, J.

A.B. appeals and N.F. cross-appeals the adjudication of their daughter, A.B., and N.F.'s daughter from a previous relationship, M.B., as children in need of supervision by reason of the fault or habits of A.B. and N.F., hence bringing the children within the jurisdiction of the separate juvenile court of Lancaster County in accordance with Neb. Rev. Stat. § 43-247(3)(a) (Reissue 1988).

The State introduced evidence that appellant A.B. had twice been convicted of committing sex crimes against children. One of the crimes occurred in Iowa and involved another daughter of A.B.'s. One conviction was the result of a guilty plea; the other was pursuant to a guilty verdict following a jury trial. Although A.B. was incarcerated as a result of these actions, he did not receive treatment for his impulses to sexually abuse children. A.B. had confided in N.F., the children's mother, regarding the existence of these two convictions, but denied the factual bases of the convictions. N.F. testified she did not think that A.B. posed a threat to either her own daughter or the daughter they had had together. She continued to leave the children with A.B. unsupervised, despite the demands of the Department of Social Services that she not do so.

The State has intervened due to the allegedly high risk A.B. poses to the children, as a repeat sex offender who has not received treatment for his disorder. Although no evidence exists that A.B. has made inappropriate contact with the girls, he

testified he avoided diapering and bathing them, to prevent any further accusations like those in his past that resulted in the above-mentioned convictions.

The appellant alleges that the separate juvenile court erred in (1) finding that the State's amended petition stated a cause of action and overruling A.B.'s demurrer and (2) allowing N.F. to be questioned regarding incidents and conflicts between A.B. and N.F. Both the appellant and cross-appellant allege that the separate juvenile court erred in (1) failing to sustain their motions to dismiss at the close of the State's evidence and (2) finding that the children lacked proper parental care by reason of the fault and habits of A.B. and N.F.

We decide this case de novo on the record. See *In re Interest of J.L.M. et al.*, 234 Neb. 381, 451 N.W.2d 377 (1990).

We have stated that the jurisdiction of the State in juvenile adjudication cases arises out of the power every sovereignty possesses as parens patriae to every child within its borders to determine the status and custody that will best meet the child's needs and wants. See *Stewart v. McCauley*, 178 Neb. 412, 133 N.W.2d 921 (1965). In that case, we elaborated on the role of the juvenile court:

> The juvenile court is a product of the solicitude of the law for the welfare of infants. Its powers and duties are described more or less in detail in our statutes, and because of their humanitarian and beneficient [sic] purpose, they should be liberally construed to the end that their manifest purpose may be effectuated to the fullest extent compatible with their terms.

Id. at 418, 133 N.W.2d at 925.

If evidence of the fault or habits of a parent or custodian indicates a risk of harm to a child, the juvenile court may properly take jurisdiction of that child, even though the child has not yet been harmed or abused. See, *In re Interest of S.R., D.R., and B.R., ante* p. 871, 479 N.W.2d 126 (1992); *In re Interest of S.L.P.*, 230 Neb. 635, 432 N.W.2d 826 (1988); *In re Interest of J.D.M.*, 230 Neb. 273, 430 N.W.2d 689 (1988); *In re Interest of E.R., J.R., and A.R.*, 230 Neb. 646, 432 N.W.2d 834 (1988).

As we found in *In re Interest of W.C.O.*, 220 Neb. 417, 419,

370 N.W.2d 151, 153 (1985),

> [t]he question that we must therefore address is whether a child lacks proper parental care by reason of the fault or habits of his parent if his parent has committed a sexually abusive act upon another minor child. The danger of permitting such a father to remain in a position where he may be alone with his own minor child should be obvious. It is not the intent or purpose of the juvenile code to require the separate juvenile court to wait until disaster has befallen a minor child before the court may acquire jurisdiction. If it is reasonable to assume that injury will occur absent action by the court, then the court may assume jurisdiction and act accordingly.

This court's position discouraging juvenile courts from waiting until tragedy has befallen a child before intervention occurs is clearly not a novel one. In light of our consistent position in cases concerning juvenile adjudications under § 43-247(3)(a), we find that the amended petition sufficiently stated a cause of action and that the State was not required to allege these children had been subjected to sexual abuse by A.B. The petition set out the crimes of which A.B. had been convicted and the corresponding risk to these children due to A.B.'s failure to seek treatment for his propensity toward sexual contact with minors. The assignment is without merit.

As to A.B.'s contention that the court improperly considered N.F.'s testimony regarding her domestic altercations with A.B., we affirm.

The record reflects that this testimony was not solicited as evidence against A.B., but was offered for the limited purpose of establishing N.F.'s inability to protect the children from the risk posed by A.B. and to impeach her testimony that she was not afraid of him. The assignment is without merit.

N.F. admitted that she had left her children alone with A.B. approximately 15 times since learning of his history of sexual contact with children. Despite her in-court testimony to the contrary, N.F., to date, has not proven her reliability in keeping her daughters away from unsupervised contact with A.B.

We find that the separate juvenile court of Lancaster County did not abuse its discretion in overruling appellant's and

cross-appellant's motions to dismiss or in its finding that the children fell within § 43-247(3)(a), lacking proper supervision by reason of the fault or habits of A.B. and N.F., and that the children were within the court's jurisdiction.

We affirm the adjudication decision in its entirety.

AFFIRMED.

JOSEPH J. POLICKY, APPELLANT, V. RHONDA L. POLICKY, APPELLEE.

479 N.W.2d 795

Filed February 14, 1992. No. 91-491.

Appeal from the District Court for Seward County: BRYCE BARTU, Judge. Affirmed.

David L. Kimble, of Souchek & Kimble, for appellant.

Thomas M. Wakeley, of Legal Services of Southeast Nebraska, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

PER CURIAM.

Joseph J. Policky appeals from the judgment of the district court for Seward County in a proceeding to dissolve his marriage to Rhonda L. Policky. The court found that Joseph and Rhonda Policky were fit parents of their minor son. Joseph Policky contends that the district court abused its discretion in awarding custody of the parties' minor child to the mother, Rhonda Policky, with reasonable visitation to Joseph Policky, and by failing to equitably divide the Policky marital estate.

> "In an appeal involving an action for dissolution of marriage, the Supreme Court's review of a trial court's judgment is de novo on the record to determine whether there has been an abuse of discretion by the trial judge, whose judgment will be upheld in the absence of an abuse

> of discretion. In such de novo review, when the evidence is in conflict, the Supreme Court considers, and may give weight to, the fact that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another."

Moser v. Moser, ante p. 617, 617-18, 476 N.W.2d 922 (1991). Accord, *Schulze v. Schulze*, 238 Neb. 81, 469 N.W.2d 139 (1991); *Huffman v. Huffman*, 236 Neb. 101, 459 N.W.2d 215 (1990). "Child custody in a proceeding to dissolve a marriage is a matter within the trial court's discretion." *Ritter v. Ritter*, 234 Neb. 203, 208, 450 N.W.2d 204, 209 (1990). Accord *Peterson v. Peterson*, 224 Neb. 557, 399 N.W.2d 792 (1987). The division of property in marriage dissolution cases is a matter initially entrusted to the discretion of the trial judge. *Guggenmos v. Guggenmos*, 218 Neb. 746, 359 N.W.2d 87 (1984). See, *Taylor v. Taylor*, 222 Neb. 721, 386 N.W.2d 851 (1986); *Sullivan v. Sullivan*, 223 Neb. 273, 388 N.W.2d 516 (1986).

From our de novo examination and review of the record, we have determined that the district court did not abuse its discretion regarding child custody or property division in this proceeding. See *Moser v. Moser, supra*.

AFFIRMED.

KIM M. WIESE, APPELLANT, V. BECTON-DICKINSON CO., APPELLEE.
480 N.W.2d 156

Filed February 14, 1992. No. 91-587.

1. **Workers' Compensation: Evidence: Appeal and Error.** Findings of fact by the Nebraska Workers' Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong. In testing the sufficiency of the evidence to support findings of fact made by the court after rehearing, the evidence must be considered in the light most favorable to the successful party. In an appeal, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence.
2. **Appeal and Error: Words and Phrases.** Plain error is error which was unasserted

or uncomplained of at trial or on appeal, but is plainly evident from the record, which prejudicially affects a litigant's substantial right and which is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process.

3. **Workers' Compensation: Evidence: Appeal and Error.** A judgment, order, or award of the compensation court may be modified, reversed, or set aside if there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award.
4. **Workers' Compensation: Appeal and Error.** Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous.
5. **Trial: Expert Witnesses.** A fact finder or trier of fact may accept or reject an opinion from an expert witness.

Appeal from the Nebraska Workers' Compensation Court. Reversed and remanded for further proceedings.

Clark J. Grant, of Grant, Rogers, Maul & Grant, for appellant.

John R. Hoffert, of Knudsen, Berkheimer, Richardson & Endacott, for appellee.

HASTINGS, C.J., BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ.

FAHRNBRUCH, J.

Kim M. Wiese appeals the Workers' Compensation Court's dismissal of her petition requesting compensation for the injuries which she claims she received arising out of and in the course of her employment with Becton-Dickinson Co. (B-D).

Wiese's two assignments of error combine to claim that the compensation court erred in determining that she failed to sustain her burden of proof on causation of the injury to her left arm and shoulder. Because we find that there was plain error committed by the Workers' Compensation Court in regard to its finding concerning the injuries to Wiese's arm and shoulder, it is not necessary to discuss the appellant's assignments of error.

We reverse the decision of the Workers' Compensation Court and remand the cause for a new trial.

On appeal,

"[f]indings of fact by the Nebraska Workers'

> Compensation Court after rehearing have the same force and effect as a jury verdict in a civil case and will not be set aside on appeal unless clearly wrong. . . . In testing the sufficiency of the evidence to support findings of fact made by the Nebraska Workers' Compensation Court after rehearing, the evidence must be considered in the light most favorable to the successful party. . . . Every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence."

Schlup v. Auburn Needleworks, *ante* p. 854, 857, 479 N.W.2d 440, 443-44 (1992).

In 1986, the appellant, who had been employed 10 years in various departments of B-D, a pharmaceutical supplies manufacturer, began experiencing pain in her left arm and shoulder, in both her hands, and in her neck. In 1985, Wiese began working in the wash-and-dry department, where she processed approximately 200 metal trays per day. Each tray weighed between 30 and 35 pounds and was lifted by Wiese four or five times during processing.

Wiese testified that the onset of her symptoms occurred gradually and coincided with her pregnancy in 1986. She sought medical advice from several doctors in 1987 and 1988 and was diagnosed as having bilateral carpal tunnel syndrome. Surgery was performed in May 1988 which proved unsuccessful in relieving the pain in her left hand, shoulder, and arm. Wiese has been compensated by B-D for the expenses of that surgery and for the resulting temporary total disability.

In April 1989, Wiese consulted Dr. Kip Burkman, a physician specializing in physical medicine and rehabilitation. She complained of numbness and tingling in the posterior left upper shoulder girdle. She complained to a lesser degree of numbness and tingling in her arm. She stated that these symptoms were worsening with time. Dr. Burkman diagnosed Wiese as suffering, in part, from myofascial pain syndrome of the left arm due to repetitive motion. In hopes of alleviating her pain, Dr. Burkman and Wiese experimented with numerous courses of pain therapy and treatments, none of which

provided more than short-term relief. Following more than a year of such attempts, it was Dr. Burkman's opinion, based on a reasonable degree of medical certainty, that Wiese suffered a 23-percent permanent partial impairment to the body as a whole. In Dr. Burkman's opinion, the appellant suffered a left posterior shoulder girdle myofascial pain syndrome secondary to repetitive work injuries sustained at B-D. Dr. Burkman stated that at the time he made the rating, Wiese had reached maximum medical improvement.

Although Wiese was able to obtain a position at B-D involving less lifting, her condition failed to improve. In November 1990, Dr. Burkman restricted her from work. At the request of B-D, Wiese was examined by Dr. Michael O'Neil in February 1991. Dr. O'Neil concluded that Wiese has a maximum 5-percent permanent impairment of the hand as a result of the carpal tunnel surgery. He was unable to form an opinion as to whether her left shoulder and arm pain were work related.

Wiese filed a petition with the Workers' Compensation Court on July 11, 1990, alleging that she sustained the following injuries as a result of repeated and continuous motion arising out of and in the course of her employment with B-D: (1) left carpal tunnel syndrome, (2) left posterior shoulder girdle and trapezius myofascial pain syndrome, and (3) left ulnar neuropathy. The appellant alleged that as a result of these injuries, she suffers from a permanent disability and is unable to continue her present employment. B-D denied her allegations.

A three-judge panel of the Workers' Compensation Court found that the carpal tunnel surgery was compensable but that all benefits for that injury had already been paid. The court found that the injuries to Wiese's arm and shoulder were not compensable. The court stated:

> The principal issue herein is one of causation. The Court finds that the plaintiff has failed to sustain her burden of proof on this issue. There is evidence to show that the plaintiff's problems with her left shoulder and arm started in 1986 with a pregnancy *and that Dr. Burkman was not informed of this history.* . . . [T]he value of the opinion of

> an [expert] is no stronger than the facts upon which it is based.

(Emphasis supplied.) The court noted that Dr. O'Neil was unable to state with any certainty that Wiese's shoulder and arm injuries were work related, and noted that her symptoms had not changed since she stopped work in November 1990.

It is the court's statement regarding Dr. Burkman's lack of knowledge of the onset of Wiese's symptoms with her 1986 pregnancy that forms the basis for this appeal. The compensation court's finding is unsupported by the evidence. Its ruling based upon this erroneous finding constitutes plain error. Plain error is error which was unasserted or uncomplained of at trial or on appeal, but is plainly evident from the record, which prejudicially affects a litigant's substantial right and which is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damage to the integrity, reputation, and fairness of the judicial process. *Phelps v. Phelps, ante* p. 618, 477 N.W.2d 552 (1991).

The record reflects that at the time of the onset of the pain and in the early phase of her medical treatment, Wiese stated that her symptoms arose with her pregnancy. She was unable to isolate any particular incident or exacerbating factors in the development of the pain. She did not associate her symptoms with her work until she was informed of the connection by Dr. Louis Sojka, the surgeon who performed the carpal tunnel surgery. Subsequently, Wiese informed Dr. Burkman on her initial visit with him that her symptoms were work related. In his deposition, Dr. Burkman stated that Wiese never gave him a history of the onset of her symptoms with her pregnancy. He was, however, provided with a report from Dr. Kathleen Wilken, whom Wiese had seen previously. In that report, the history recounted that the onset of Wiese's symptoms occurred with her pregnancy.

Dr. Wilken's report is quoted in B-D's letter brief to the Workers' Compensation Court which was submitted in lieu of a closing argument. In that brief, B-D states that this "detailed history was never provided by the plaintiff [Wiese] to the plaintiff's principal expert, Dr. Kip Burkman." The record reflects that not only did Dr. Burkman have Dr. Wilken's

report, but after Dr. Burkman discussed its contents with B-D's counsel at the deposition, counsel requested a copy of it from the doctor.

It is also clear from the record that when forming his opinion on causation, Dr. Burkman was aware of Wiese's medical history, including the pregnancy. The deposition of Dr. Burkman includes a discussion of the content of Dr. Wilken's report, after which the following exchange on cross-examination occurred:

> Q. . . . I take it a history is important to you in reaching an opinion as to the cause of the injury you diagnose?
>
> A. Correct.
>
> Q. And in the present case, I take it it's particularly true because the plaintiff was largely your sole source for your opinion on causation; is that accurate?
>
> A. *Again, I have the records, as previously stated, to help that point.*

(Emphasis supplied.)

A judgment, order, or award of the compensation court may be modified, reversed, or set aside if there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award. Neb. Rev. Stat. § 48-185(3) (Supp. 1991). Factual determinations by the Workers' Compensation Court will not be set aside on appeal unless such determinations are clearly erroneous. *Phipps v. Milton G. Waldbaum & Co.*, *ante* p. 700, 477 N.W.2d 919 (1991). The finding of the court that Dr. Burkman was not informed of the history of Wiese's pregnancy was clearly erroneous and is set aside.

In addition, the significance of Dr. Burkman's supposed lack of knowledge of the pregnancy is not clear from the record or from the court's order. No evidence linking Wiese's symptoms with her pregnancy was adduced other than her own statements that the two coincided in time. These statements could be regarded as Wiese's attempt to pinpoint the time that the symptoms arose, rather than an attempt to attribute her shoulder and arm pain to the fact that she was then pregnant. There is no expert testimony or other medical evidence in the record to show that her symptoms were in fact caused by the pregnancy.

B-D characterizes the Workers' Compensation Court decision as the result of a choice between conflicting medical testimony. This court has repeatedly held that a fact finder or trier of fact may accept or reject an opinion from an expert witness. *Heiliger v. Walters & Heiliger Electric, Inc.*, 236 Neb. 459, 461 N.W.2d 565 (1990). However, here the court has misconstrued the testimony of an expert. The factual determination being erroneous, the order of the Workers' Compensation Court will be set aside. *Phipps, supra.* Wiese's petition on rehearing should not have been dismissed on the ground that Dr. Burkman was not fully informed of her history.

No attorney fees for this appeal are awarded to Wiese because she has failed to increase her award in this court. See, Neb. Rev. Stat. § 48-125 (Supp. 1991); *Mata v. Western Valley Packing*, 236 Neb. 584, 462 N.W.2d 869 (1990).

The order of the Workers' Compensation Court dismissing Wiese's petition for benefits is reversed, and the cause is remanded for proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

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